Supreme Court, U.S.
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No. 92-1563

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GERALD B. WATSON, JR.,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Joel S. DeVore
Counsel of Record
Luvaas, Cobb, Richards
& Fraser, P.C.
777 High St., Suite 300
Eugene, OR 97401
(503) 484-9292
Counsel for Petitioner

Ralph Fallon Cobb
Luvaas, Cobb, Richards
& Fraser, P.C.
777 High St., Suite 300
Eugene, OR 97401
(503) 484-9292
Of Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

On December 4, 1988, an administrator discharged petitioner from employment in the Federal Aviation Administration for refusing a demand that he submit to the particular random drug test authorized by the agency.

1. Must the Federal Circuit Court of Appeals and the Merit Systems Protection Board defer to the finding of the administrative judge who determined, based upon the credibility of the administrator as a witness, that the administrator, in selecting a penalty, had not exercised any discretion, and thereby abused it?

2. May the Merit Systems Protection Board review an agency's penalty decision de novo, evaluate the circumstances anew, and regard the agency's failure of discretion to be immaterial?

3. Must an administrator consider that the agency's random drug testing was unlawful in the jurisdiction at the time, when he considers all circumstances relevant to the selection of a penalty for an employee's refusal to submit to the test?

4. Regardless who may exercise discretion, does the discharge of a long-term employee for refusal to submit to the agency's testing constitute an abuse of discretion or a capricious penalty, where the employee was not suspected of drug use, he had promptly volunteered an independent drug test showing him to be

"clean," and his objection was consistent with a judicial declaration in his jurisdiction that suspicionless drug testing was then unconstitutional?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gerald Bruce Watson, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered in this proceeding on November 18, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is noted at 983 F2d 1088 (1992) (table). It is unpublished. The three opinions, including the dissent and a concurrence, are reprinted in the appendix. (App-1 to App-21) The final opinion of the Merit Systems Protection Board is reported at 49 MSPR 509 (App-22 to App-42). Its initial opinion by the administrative judge is reproduced in the appendix. (App-43 to App-71)

JURISDICTION

The decision of the United States Court of Appeals for the Federal Circuit was filed and entered on November 18, 1992. A timely petition for rehearing and suggestion for rehearing in banc was filed on December 2, 1992. The petition was denied December 29, 1992. This Court has jurisdiction pursuant to 28 USC § 1254(1).

STATUTES INVOLVED

The standard for discipline of a federal employee, 5 USC § 7513(a), provides:

> Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

The employee may seek review before the Merit Systems Protection Board pursuant to 5 USC § 7701(c)(1), which provides:

> Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision --
>
> (A) in the case of an action based on unacceptable performance described in section 4303 or a removal from the Senior Executive Service for failure to be recertified under section 3393a of this title, is supported by substantial evidence, or
>
> (B) in any other case, is supported by a preponderance of the evidence.

The board's decision may be reviewed under 5 USC § 7703(a) and (b), which provides in relevant part:

> (a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.
>
> . . . . .
>
> (b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. . . .

The court's scope of review is described in 5 USC § 7703(c), which provides:

> In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be --
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence.

STATEMENT OF THE CASE

I. Removal from Service

Bruce Watson worked for the Federal Aviation Administration's field office in Eugene, Oregon. Over the course of eleven years, his work had been reviewed as fully successful. (App-81) About 11:45 a.m., August 18, 1988, his supervisor told him that drug testing people would test him at 1:30 p.m.[1] Mr. Watson was told the test was a random one, it was not related to his performance, and he was not suspected of using drugs. (App-82)

Mr. Watson sought legal advice. He found an attorney's name in the telephone directory listed under constitutional law. The attorney advised that the drug test was not legal. Coincidentally, the Ninth Circuit

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[1] Transcript of Hearing before the Merit Systems Protection Board, Seattle Regional Office, John W. Tapp, Administrative Judge, March 9, 1989, pp 46-47 (hereafter "Tr") (testimony of supervisor, Dean Stead).

Court of Appeals had ruled earlier that year that post-accident drug testing of railway employees, without individualized suspicion, was an unconstitutional search. *Railway Labor Executives' Ass'n v. Burnley*, 839 F2d 575 (Feb. 11, 1988), *rev'd, Skinner v. Railway Labor Executives' Ass'n*, 489 US 602; *National Treasury Employees Union v. Von Raab*, 489 US 656 (March 21, 1989). The attorney informed the supervisor that Mr. Watson had decided not to take the test. (Tr 47-48)

That afternoon, Mr. Watson told his lawyer he had nothing to hide. The attorney arranged an independent drug test at a local clinic. Within two hours of the FAA's intended test, Mr. Watson gave the clinic a sample for screening.[2] The results were negative in all particulars. Mr. Watson provided the agency with the test report, when received, on August 23, 1989. Mr. Watson discussed the test with the regional manager, Donald Coones and recounted that it showed he was not a drug user. (Tr 22 & 48) The manager admitted that he had no reason not to believe Mr. Watson. (Tr 22)

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[2] Tr 48-49; International Clinical Laboratories, Inc., Drug Test Results; Collected August 18, 1988; Report, August 22, 1988: Appellant Exhibit E, from Hearing Before Administrative Judge (March 9, 1989).

Nonetheless, on August 31, 1989, the regional manager suspended Mr. Watson and notified him that the FAA intended to remove him from federal employment on grounds that he had refused to provide a urine specimen as part of the authorized drug test program. Quoting FAA Order 3910.6, the manager wrote:

> Refusal to submit to testing, or failure to cooperate with the collection procedures will be grounds for removal from the Federal service.

(Letter, Coones to Watson (Aug. 31, 1989): Agency Exhibit 19; see also Order 3910.1, Section 1(C) [App-77]).

Mr. Watson sought a declaration and an injunction in the United States District Court for the District of Oregon. The court dismissed, finding the sole remedy to be the Civil Service Reform Act, 5 USC § 7501 *et seq.*[3] In the meantime, Mr. Watson wrote manager Coones, incorporated his constitutional objections to suspicionless drug testing, and contended that dismissal was unwarranted.

Finding discipline warranted, the manager determined the penalty. He said no one directed him to remove Mr. Watson (Tr 26), but, "to some point," he felt constrained to remove (Tr 35). The manager gave

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[3] Slip Opinion, *Watson v. United States,* Case No 8806363-E (D Or, Oct. 25, 1988).

"very limited consideration" to doing something else to Mr. Watson. (Tr 27) He testified that he looked for extenuating circumstances or any reason not to proceed with "the normally prescribed adverse action that was required." (Tr 24) He looked for something to say that this was not "just a direct case of refusal to submit [a] specimen," but he found no mitigating circumstances. (Tr 24-25)

When asked at hearing to describe mitigating circumstances that would permit a lesser penalty, he offered two: one where a drug user enters rehabilitation, and a second where the employee had never received notice of the testing program. (Tr 32-33) When asked for other mitigating circumstances he would consider, he testified "Those are the two that come to mind, obviously. I can't think of any others." (Tr 33)

On November 10, 1988, the manager wrote Mr. Watson to announce that he would be removed from federal service effective December 4. (DOT Removal Letter)

II. Proceedings Below

Mr. Watson sought review before the Merit Systems Protection Board (hereafter "MSPB"). On April 21, 1989, administrative judge John W. Tapp found from the manager's demeanor that he was not credible when claiming to have exercised some discretion when reviewing the penalty. The administrative judge declared:

> Finally, Donald Coones, purportedly the proposing and deciding official in this case, left me with the clear impression that he had merely gone through the motions of decision-making. In response to the agency representative's question whether he had "felt constrained by the program's requirement for removal," he responded, "to some point" (Tr 35-36), but still maintained he had discretion to select a lesser penalty. (Tr 25) I did not find him convincing on this point. Neither his affect, his demeanor, nor the substance of his responses suggested that he had in fact exercised any discretion.

(App-58) The administrative judge reinstated Mr. Watson with backpay, finding the agency had abused its discretion in imposing removal, and he ordered that a 45 day suspension be imposed instead.

On July 25, 1991, the MSPB reversed the initial decision and sustained the agency's decision to discharge Mr. Watson. On November 18, 1992, the Federal Circuit sustained the board's decision. Judge Pauline Newman dissented (App-8 to App-16), and Judge Paul Michel responded to the dissent in a concurring opinion (App-17 to App-21).

REASONS FOR GRANTING THE WRIT

I. *Contrary to the decisions of this court, the Federal Circuit sanctions the disregard of an administrative judge's credibility determination concerning a live witness and permits the reassessment of the witness's credibility from a written record.*

A. Importance of Discretion

An agency may discipline an employee "only for such cause as will promote the efficiency of the service." 5 USC § 7513(a). The Merit Systems Protection Board construes this standard to pose two separate questions, described as nexus and penalty. First, did the agency demonstrate a relationship or nexus between the employee conduct and the efficiency of the service? Second, did the agency consider the relevant factors of the particular case and arrive at a penalty that was within the "tolerable limits of reasonableness?" *Douglas v. Veterans Administration*, 5 MSPB 313, 328-29 (1981). The Federal Circuit reviews to determine whether there was substantial evidence to support the nexus determination, and whether the agency's penalty was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 USC § 7703(c); *see, e.g., Graybill v. United States Postal Service*, 782 F2d 1587 (1986); *Hayes v. Department of the Navy*, 727 F2d 1535, 1537 & 1540 (1984). This court has recognized that an administrator abuses

discretion, when failing to consider all the relevant factors. Even more fundamentally, an administrator abuses discretion, when failing to exercise it. *See Citizens To Preserve Overton Park, Inc.*, 401 US 402, 416 (1971) (reversed and remanded for demonstration whether and how administrator considered factors concerning a highway crossing a park).

B. No Discretion Exercised

One person alone made the decision to discharge Bruce Watson. (Tr 20) That person, Donald Coones, claimed to have had discretion. (Tr 37) The administrative judge observed Mr. Coones testify, expressly found that his demeanor revealed him not to be believable, and concluded that he had not exercised any discretion. (App-58) Indeed, the only two mitigating circumstances, which Mr. Coones recognized, were not matters of his discretion but were prohibitions on discipline, which were mandated by rule.[4]

C. Credibility Disregarded

The board and court below disregarded this credibility determination by reasoning that just because Mr. Coones could only recall only two potentially

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[4] *See* Exec Order 12564, § 5(b), 51 Fed Reg 32889 (1986) (no discipline if drug user enters rehabilitation); DOT Order 3910.6 (3910.1), Ch III, §§ 5 & 6 (advance notification of testing required).

mitigating circumstances did not mean he would not consider others. (App-3 [majority opinion]; App-36 to App-37 [board decision]) The board and court preferred to take Mr. Coones' statements at face value based on the written record. (*Id.*)

The court below was quite correct that, in circumstances where the board articulates a sound reason based on the record, the board may evaluate testimony differently. *Jackson v. Veterans Administration*, 768 F2d 1325 (Fed Cir 1985). Additional independent evidence may make a credibility determination less decisive. 768 F2d at 1333 (presiding official overlooked other witness). In a similar way, the Ninth Circuit Court of Appeals employs a distinction between testimonial inferences, which an administrative judge draws while watching testimony, and derivative inferences, which anyone may draw based on the objective content of the testimony. *Penasquitos Village, Inc. v. National Labor Relations Board*, 565 F2d 1074, 1078-79 (9th Cir 1977). A board may reasonably draw derivative inferences *from testimony that has not been discredited* so as to reach an ultimate conclusion that differs from the administrative judge. However, a board may not dispute the administrative judge's testimonial inferences. *Id.* In this case, the Federal Circuit had no reason to reassess Mr. Coones' credibility. Precisely because he was not believable, his statements cannot be given new inferences.

There was nothing outside his testimony to make his credibility immaterial. The board and court noted that, at the hearing following discharge, the agency submitted the affidavit of Melissa Allen, an official from Washington, D.C. (App-3; App-35 to App-36) Her affidavit asserted that at some undescribed time and place, for reasons not explained, the agency had chosen not to discharge two unnamed employees for failure to cooperate in drug testing. Ms. Allen, however, was never shown to have had any involvement in the slightest with the circumstances leading to Mr. Watson's discharge. (*See* Tr 18, 20 & 26) Her affidavit might be relevant to rebut a charge that the agency on the whole invokes a predetermined penalty, but, as for Mr. Watson's circumstances, her affidavit is irrelevant. It cannot be "a sound reason based on the record" for disregarding Mr. Coones' credibility. It is only his failure to exercise discretion that matters.

D. Conflict With This Court

This court recognizes that the significance of a credibility finding depends upon the importance of credibility in a particular case. *Universal Camera Corp. v. National Labor Relations Board*, 340 US 474, 496 (1951). This case turns upon Mr. Coones' credibility. The administrative judge is the only one who "can be aware of variations in demeanor and tone of voice that bears so heavily on [the] listener's understanding and belief in what is said." *See Anderson v. City of Bessemer City*, 470 US 564, 575 (1985). Because this case depends on demeanor, there are "compelling and

familiar justifications" for according weight to the administrative judge's findings. *See Miller v. Fenton*, 474 US 104, 114 (1985). Having heard the evidence and seen the witnesses, the administrative judge is best qualified to have decided whether Mr. Coones truly exercised any discretion. *See Universal Camera Corp. v. National Labor Relations Board*, 340 US at 494. Because the decision of the Federal Circuit conflicts directly with the decisions of this court, and because its decision represents a departure from the accepted and usual course of proceedings, this court should grant review.

II. *Contrary to 5 USC § 7701(c)(1), the Federal Circuit invites the Merit Systems Protection Board to review an agency's penalty decision de novo and substitute board review after-the-fact for agency discretion before-the-fact.*

A. After-Discharge Discretion

The Federal Circuit determined that the discharge is defensible because the Merit Systems Protection Board has exercised discretion. The court stated:

> Here, the full Board examined all the evidence and concluded that the factors supporting mitigation were simply outweighed by those supporting removal.

(App-4; *see also* App-21 [Michel, J., concurring] [concluding that the board did not abuse *its* discretion]). The court's rationale enlarges the board's scope of review beyond the bounds of federal statute and the board's decisional law.

B. Scope of Board's Review

Subject to review for abuse, federal statutes place discretion in the hands of the agency, not any reviewing body. At 5 USC § 7513, it is "*an agency*" that is authorized to discipline an employee for such cause as promotes the efficiency of the service. The employee's recourse is an "*appeal*" to the board. 5 USC § 7513(d). Although the board's scope of review is broader in some respects, "*the agency decision*" remains the focus of attention. Subsection (c)(1) of 5 USC § 7701 provides in relevant part:

> [T]he *decision of the agency* shall be sustained under subsection (b) only if the *agency's decision* --
>
> (A) in the case of an action based on unacceptable performance described in section 4303 . . . is supported by substantial evidence, or
>
> (B) in any other case, is supported by a preponderance of the evidence.

(Emphasis added.) These standards of review recognize a difference in the issues before the board. Matters of performance are reviewed only for substantial evidence. Other matters require a preponderance of the evidence. *Id.* And, claims of flaws in agency procedures require proof of "harmful error." 5 USC § 7701(c)(2); 5 CFR § 1201.56(c)(3).

It is true that the board has described its preponderance review as *de novo* review. *Douglas v. Veterans Administration*, 5 MSPB 313, 316 (1981). This is true of review, for example, where finding facts that reflect a nexus between employee conduct and the efficiency of the service. The choice of a penalty, however, is a different issue. The statutes do not suggest that the board may simply substitute its review for the agency's discretion in selecting a penalty. The statutes do not suggest that the board may justify a penalty after discharge in lieu of agency discretion in the first instance. Employee discipline remains an "agency decision" taken in the exercise of agency discretion.

With regard to the penalty issue, the board previously construed its statutory authority carefully. In *Yeager v. General Services Administration*, 39 MSPR 147 (1988), the board summarized:

> The Board will review an agency-imposed penalty only to determine if the agency conscientiously considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *See*

> *Douglas v. Veterans Administration*, 5 MSPB 313, 5 MSPR 280, 306 (1981). Only if the Board finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the Board then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. *Id.* In making such determinations, the Board gives due weight to the *agency's primary discretion* in exercising its managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to assure that managerial judgment has been properly exercised.

(Emphasis added.) If the agency has responsibility to exercise its discretion but it fails to do so, the discharge cannot be rationalized after the fact by a board decision. The board cannot say, "Well, we would have reached the same decision anyway."

C. Danger in New Scope of Review

In an analogous setting, the Interstate Commerce Commission demoted two employees. The employees contended that the decision amounted to a reduction in force without the requisite procedural protections. The Merit Systems Protection Board affirmed, finding that the employees would not have fared better with proper

RIF procedures than with the board's compromise. Citing a decision of this Court, the Court of Appeals for the District of Columbia rejected the attempt at after-the-fact rationalization. The court explained:

> In *SEC v. Chenery*, 3323 US 194, 67 SCt 1575, 91 LEd 1995 (1947), the Supreme Court set forth a "simple but fundamental rule of administrative law." *Id.* at 196, 67 SCt at 1577. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. *Id.* (emphasis added). The rationale of this rule is clear. "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. . . . [A]n appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." The same rationale applies when the reviewing body is an administrative tribunal rather than a court. Simply put, the Board should not be in the business of affirming administrative decisions based upon how an

> agency might have acted if it had followed proper procedures. *The role of review is to evaluate agency discretion as it has been exercised.*

Horne v. Merit Systems Protection Board, 684 F2d 155, 157-58 (DC Cir 1982). The board's decision was vacated, and the matter remanded to the ICC to exercise its discretion in following the proper RIF process, which may or may not have allowed the employees better protection.

For the same reasons, the Federal Circuit may not invite the board to rationalize this discharge after the fact. First, the statutes require that discipline must occur with an *agency decision* in the exercise of the agency's discretion. *See* 5 USC § 7513; 5 USC § 7701(c)(1). Second, review cannot substitute for discretion. Such review denies the employee the right to have had discretion exercised, before decision, on a local level, one on one, with a full review of all the mitigating circumstances, and with a chance at a lesser penalty. Third, such review will be inherently biased toward sustaining the decision already reached, rather than beginning with a fresh review of available options.

D. Importance of Issue

The question of the board's scope of review on penalties is an important federal statutory issue. The board's jurisdiction is national and the Federal Circuit reviews all board matters. 5 USC § 7703(b). The

board's decision, as shown by the court's reading of it, will have national ramifications potentially affecting all federal employees. The review statute, 5 USC § 7701(c)(1), is subject to misunderstanding and needs clarification. This court has visited the statute, but has not yet construed it. *Cornelius v. Nutt*, 472 US 648, 660-62 (1985) (MSPB's harmful error rule); *see also Department of the Navy v. Egan*, 484 US 518 (1988); *Lindahl v. Office of Personnel Management*, 470 US 768 (1985). For these reasons, the court should grant review.

III. *As a new development in federal law, the Federal Circuit permits the agency to disregard, among circumstances relevant to choice of a penalty, (a) the employee's right to rely upon decisional law of his jurisdiction and (b) the agency's obligation to comply with that law at the time of its order.*

A. Discipline in Context

The central fact in this case is that on February 11, 1988, the Ninth Circuit Court of Appeals declared post-accident drug testing of railway employees to be an unconstitutional search, where individualized suspicion was lacking. *Railway Labor Executives' Ass'n v. Burnley*, 839 F2d 575. Until reversed a year later in *Skinner v. Railway Labor Executives' Ass'n*, 489 US 602; *National Treasury Employees Union v. Von Raab*, 489 US 656 (March 21, 1989), that judicial declaration

represented the law as it was understood in Mr. Watson's region of the country. It was during this year's time when the agency pressed forward with suspicionless drug testing and during this time when Mr. Watson objected to testing but still supplied a prompt independent test.

On the same day that he tendered a "clean" test result, Mr. Watson sought a judicial determination of the constitutionality of the agency's testing.[5] He cited the *Burnley* decision, among others.[6] He incorporated the court documents by reference in his response to the agency manager, who was then considering discharge.[7] The seeming unlawfulness of the agency's direction to Mr. Watson was unmistakably a circumstance relevant to the exercise of discretion in selecting a penalty.

Yet, the manager looked for only two situations as potentially mitigating circumstances: a drug user who begins rehabilitation or an employee without notice of the testing program. (Tr 24, 25, 27, 32, 33, 36 & 37)

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[5] Complaint, *Watson v. United States*, No. 88-6363-E, (D Or, August 23, 1988).

[6] Request for Temporary Restraining Order, p 15, *Watson v. United States*, No 88-6363-E, (D Or, September 27, 1988).

[7] Letter, Michael McGrady (attorney) to Donald G. Coones (sector manager) (October 5, 1988): Agency Exhibit 21 (Tab D).

Even if credibility problems are put aside, Mr. Coones' testimony reveals that he did not consider the then apparent unconstitutionality of the agency's order to Mr. Watson as a mitigating circumstance. Even if board review could substitute for agency discretion, the board did not consider the seeming unlawfulness of the agency's order among the mitigating factors it discussed. (App-38 to App-40)

B. Prerequisite to Discretion

This Court understands that a prerequisite to discretion is that the agency must have considered the relevant factors. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 US 402, 416 (1971). At least until now, the Federal Circuit has reviewed to assure "that the agency considered all factors relevant to the case." *See, e.g., Hayes v. Department of the Navy*, 727 F2d 1535, 1537 (1984). Similarly, the board has listed at least a dozen factors for consideration in determining a penalty. *Douglas v. Veterans Administration*, 5 MSPB 313, 331 & 332 (1981). The Federal Circuit has found that the board's "failure to consider a significant mitigating circumstance constitutes an abuse of discretion." *VanFossen v. Department of Housing & Urban Development*, 748 F2d 1579, 1581 (Fed Cir 1984).

This case, therefore, poses novel questions. After finding that the employee *is* subject to at least *some* discipline for disobedience with an agency direction, must the agency consider as a mitigating circumstance the seeming unlawfulness of the agency's direction? The

employee may not be able to avoid discipline entirely, in as much as the federal service generally requires that the employee "comply now, grieve later." *Gragg v. United States Air Force*, 13 MSPR 296 (1982). But, within the context of the penalty phase, is the employee's good faith reliance upon the actual (not merely asserted) decisional law of his jurisdiction a relevant circumstance that must be considered? What was the agency's obligation to comply with that decisional law at the time of its order? Is the agency's obligation to have given a lawful order relevant to punishing the employee for disobeying it?

C. Undecided Question of Federal Law

The decisions below in this case represent a new development in federal law suggesting that the lawfulness of the agency's order need not be considered among factors relevant to the exercise of discretion. (App-20 [Michel, J. concurring]). This development is inconsistent with this Court's view that consideration of relevant factors is a prerequisite to discretion. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 US at 416. The employee's reliance on a judicial declaration and the agency's obligation to honor that declaration should be relevant to the exercise of discretion. Because this is a new issue of importance to the entire federal service, this court should grant review.

IV. *The Federal Circuit sanctions an abuse of discretion whereby a long-term employee is discharged, although he was not suspected of drug use, he demonstrated he was drug free, and he relied upon a judicial determination at the time.*

A. Abuse of Discretion

Regardless whether the firing official exercised any discretion, regardless whether the board may substitute its discretion, regardless whether a decision-maker must consider the temporal unlawfulness of the agency's order, this case ultimately asks whether firing Bruce Watson reflects an abuse of discretion. For several reasons, the question is compelling.

First, it is this Court's decision *after* his objection, that placed Mr. Watson in jeopardy. If the Ninth Circuit had been sustained, the agency's order to him would have remained unlawful and his discharge, upon review, would not likely have been sustained by the board. In a different setting, this Court observed that the prior statute, which authorized discipline, was not intended to authorize discharge for speech that is constitutionally protected. *Arnett v. Kennedy*, 416 US 134, 163 (1974). Presumably, the successor statute, 5 USC § 7513(a), would not authorize discharge for an employee's objection to an unlawful search and seizure.

Second, the decisions here are inconsistent with decisions in other courts which found penalties to be arbitrary, capricious, and abuses of discretion. *See, e.g., Brown v. United States Postal Service*, 860 F2d 884 (9th Cir 1988) (willful failure to follow postal procedures; removal reversed as overly harsh); *McLeod v. Department of the Army*, 714 F2d 918 (9th Cir 1983) (marijuana possession at lunchtime; removal reversed as arbitrary and capricious; remanded); *Young v. Hampton*, 568 F2d 1253 (7th Cir 1977) (conviction for cannabis possession off duty; removal reversed as arbitrary, capricious, and abuse of discretion); *Boyce v. United States*, 211 Ct Clms 57 (1976) (IRS employees' failures to file tax returns; removals reversed as disproportionate to offense); *Power v. United States*, 531 F2d 505 (Ct Clms 1976) (alleged false expense claims; removal not reversed but backpay ordered); *Jacobowitz v. United States*, 191 Ct Clms 444 (1970) (IRS officer's grossly negligent failure to process checks; removal reversed); *Clark v. United States*, 162 Ct Clms 476 (1963) (spouse's use of government auto; removal reversed).

Third, the decisions below are contrary to fundamental concepts in American law. This Court has refused to sustain the convictions of persons who were denied the chance to prove that their prosecutions were based upon an invalid administrative order. *Estep v. United States*, 327 US 114, 125 (1946) (Muprhy, J., concurring) (refusal to submit to induction). The Ninth Circuit has held that punishing an employee for disobeying an employer's unlawful order was contrary to public policy. *Garcia v. National Labor Relations*

Board, 785 F2d 807, 811 (1986) (refusal to violate California Vehicle Code)[8]

B. Agency's Duty to Obey the Law

In this case, the agency's order for suspicionless testing was seemingly unlawful at the relevant time and place. Unless and until reversed or modified, this employee was entitled to have relied upon the Ninth Circuit's decision. *See Rooker v. Fidelity Trust Co.*, 263 US 413, 415 (1923). Even where the law is given retroactive effect, it may be tempered to take into account a person's reliance on the existing law. *See James B. Beam Distilling Co. v. Georgia*, 111 SCt 2439, 2443 (1991). To say this is not to excuse this employee, but to suggest that, in the penalty phase of discipline, the agency's own obligation has been forgotten.

---

[8] The Ninth Circuit commented:

> The Board may not be charged with enforcing all laws, but it surely is not empowered to condone law violation.
>
> We believe that even though UPS and other employers may think they have legitimate reasons for placing themselves above the law, we as a court of law must not reinforce such a view.

785 F2d at 811-12.

Although the Federal Aviation Administration may have believed the Ninth Circuit was in error, the agency was bound to follow the court's decision until reversed. A court's decree is binding even when temporary and even when critics doubt its constitutional foundation. *Walker v. City of Birmingham*, 388 US 12 (1967). The FAA should not have ordered Bruce Watson to submit to suspicionless drug testing. His disregard for an instruction may justify some form of discipline, but the agency's disregard for the constitution must serve to mitigate the penalty.

C. Significance Beyond the Facts

Bruce Watson was not hostile to the agency's interest in safety. He had worked eleven years to assure the safety of the public. He had nothing to hide. He was not suspected of drug use. He provided the agency an independent drug screening, in all likelihood, before the agency's test results would have been returned. He was "clean." To discharge him for failing to use the agency's authorized process at a time when that process

would be deemed unlawful is to inflict a capricious penalty.[9]

It is the novelty of these circumstances -- the employee's reliance on the known law and the agency's disregard of it -- that distinguishes this case and that warrants this court's attention to the final issue. This court's consideration would answer the relevance of changing law to penalty considerations, no matter who that decision-maker is to be. This court's consideration would illuminate the standards of review and make discretion more than an empty promise.

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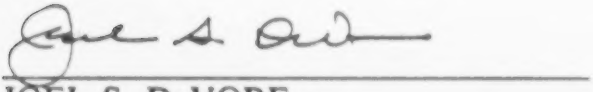
[9] Additional considerations support finding a capricious penalty, but they are not recounted here. They are better reserved for a brief on the merits. They include, for example, consistency of the penalty in the light of the agency's schedule of discipline, if any. *Douglas v. Veterans Administration*, 5 MSPB at 331-32. By comparison, admitted drug users who undergo rehabilitation are not discharged. Exec Order 12564, § 5(b), 51 Fed Reg 32889 (1986); DOT Order 3910.6 (3910.1), Ch IV, § 1.

CONCLUSION

In the interest of federal agencies and employees alike, Gerald Bruce Watson, Jr., respectfully prays that a writ of certiorari issue to review the decisions below.

Respectfully submitted,



JOEL S. DeVORE
Luvaas, Cobb, Richards & Fraser, P.C.
777 High Street, Suite 300
Eugene, Oregon 97401
(503) 484-9292
Petitioner's Counsel of Record

RALPH FALLON COBB
Luvaas, Cobb, Richards & Fraser, P.C.
777 High Street, Suite 300
Eugene, Oregon 97401
(503) 484-9292
Of Counsel for Petitioner

92-1563

Supreme Court, U.S.
FILED
MAR 26 1993
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GERALD B. WATSON, JR.,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Joel S. DeVore
Counsel of Record
Luvaas, Cobb, Richards
& Fraser, P.C.
777 High St., Suite 300
Eugene, OR 97401
(503) 484-9292
Counsel for Petitioner

Ralph Fallon Cobb
Luvaas, Cobb, Richards
& Fraser, P.C.
777 High St., Suite 300
Eugene, OR 97401
(503) 484-9292
Of Counsel for Petitioner

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-3558

GERALD B. WATSON, JR.,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

DECIDED: November 18, 1992

Before RICH, NEWMAN, and MICHEL, *Circuit Judges.*

RICH, *Circuit Judge.*

DECISION

Gerald B. Watson, Jr. (Watson) petitions for review of the July 25, 1991 final decision of the Merit Systems Protection Board (Board or full Board) in Docket No. SE07S28910074, sustaining the Department of Transportation's (DOT's or agency's) removal of Watson for refusing to submit to random drug testing in accordance with Executive Order 12564, DOT Order 3910.1, and Federal Aviation Administration (FAA) Order 3910.6. We *affirm.*

DISCUSSION

The full Board found the penalty of removal to be warranted, and thus reversed the Administrative Judge's (AJ's) mitigation of the removal to a suspension. The Board further found that "[t]he record does not support the administrative judge's finding that the agency had predetermined the penalty."

Watson's primary argument before this court is that the Board erred in not deferring to the AJ's determination that Donald Coones, the agency's deciding official, was not credible on the predetermination issue. Specifically, the AJ found unconvincing Coones' testimony that, although he felt constrained "to some point" by the removal requirement of the agency's drug testing program, he still had discretion to select a lesser

penalty. Coones left the AJ "with the clear impression that he had merely gone through the motions of decision-making."

Absent issues of witness credibility and demeanor, the full Board owes no special deference to fact findings of the AJ; the Board may reject the AJ's findings and substitute its own. *Jackson v. Veterans Admin.*, 768 F.2d 1325, 1330-31 (Fed. Cir. 1985). However, "[o]n appeal to this court, when a finding by the presiding official of this nature [respecting credibility] has been reversed by the board, we cannot sustain the board's decision unless the board has articulated a sound reason, based on the record, for its contrary evaluation of the testimonial evidence." Id. at 1331. We hold that in the instant case, the Board has articulated such reasoning. The Board correctly explained that, contrary to the negative inference drawn by the AJ, the fact that Coones could list only two specific circumstances under which he would consider mitigating the removal did not mean that he had not exercised his managerial discretion to assign a penalty within tolerable limits of reasonableness. In addition, the Board properly relied upon the affidavit of agency official Melissa Allen, who stated that the *initiation* of a removal action (the agency's policy with respect to employees in safety- or security-sensitive positions who refuse to submit to random drug testing) is not equivalent to *mandating* removal. The Board noted Ms. Allen's knowledge of at least two agency employees

who, after receiving notices of proposed removal for refusal to submit to random drug testing, ultimately received lesser penalties.

Regardless of whether the Board's final decision differs from the AJ's initial decision, this court evaluates the *Board's final decision* under the substantial evidence standard. *Jackson,* 768 F.2d at 1330. Here, the full Board examined all the evidence and concluded that the factors supporting mitigation were simply outweighed by those supporting removal. *See Baker v. Department of Health and Human Serv.*, 912 F.2d 1448, 1456 (Fed. Cir. 1990). The Board found, *inter alia,* that Watson's position as an electronics technician for the FAA involved "serious safety responsibilities," that Watson's refusal to follow his supervisor's order to submit to drug testing in accordance with the agency's program adversely affected the efficiency of the service, i.e., that there was "nexus," and that Watson lacked a good potential for rehabilitation. Substantial evidence in the record supports each of the Board's findings. Accordingly, we may not disturb the Board's decision sustaining Watson's removal. 5 USC 7703(c).

The Dissent

The dissent would reverse the full Board's decision on the basis of Watson's reliance upon the majority opinion in *Railway Labor Executives' Assn v. Burnley,* 839 F.2d 575 (9th Cir. 1988) (*RLEA I*). According to the dissent, *RLEA I* declared suspicionless drug testing by government action to be illegal wherefore that became the law in the Ninth Circuit, and was controlling at the time of Watson's refusal to be tested because all events occurred in the Ninth Circuit. The dissent reasons that removal from federal service should not be based upon an employee's refusal to comply with an unconstitutional order. Though this issue was not briefed by either party, we feel it necessary to respond.

We agree that as a matter of public policy, individuals should be able to act in accordance with what the law is at a particular time and place. However, the state of the law of suspicionless drug testing of government employees at the time of Watson's refusal was plainly unsettled, even in the Ninth Circuit. We accordingly view the asserted reliance of Watson and his attorney on *RLEA I* as unjustified and unreasonable, for at least the following reasons. First, we find it significant that Watson's refusal to undergo drug testing occurred on August 18, 1988, some two months *after* the Supreme Court granted certiorari in *RLEA I* on June 6, 1988. *Burnley v. Railway Labor Executives' Ass'n,* 486

U.S. 1042 (1988) (No. 87-1555). One swallow does not make a summer and one court's opinion, accepted for review by the Supreme Court, has not *settled* anything even in one limited geographic area. In addition, we disagree with the dissent's characterization of the drug testing procedure at issue in Watson's case as having "already been held unconstitutional." It should be noted that the regulations construed in *RLEA I*, which mandated *post-accident* drug testing for all involved railroad employees, are not identical either in form or applicability to the FAA regulations applied here, albeit both programs permit testing without particularized suspicion. *See RLEA I*, 839 F.2d at 577-78 nn.3-4 (text of Federal Railroad Administration regulations); *see also Railway Labor Executives' Ass'n v. Skinner*, 934 F.2d 1096, 1098 (9th Cir. 1991) (noting that in reversing *RLEA I*, the Supreme Court "did not address the constitutionality of random drug testing . . ."); *National Air Traffic Controllers Ass'n v. Burnley*, 700 F. Supp. 1043, 1045 (N.D. Cal. 1988) (noting that in *RLEA I*, "notably, the government was regulator, rather than, as here, employer . . . .")

The dissent criticizes the Board's reliance upon *Gragg v. United States Air Force*, 13 MSPR 296 (1982), which in turn relied upon *Walker v. City of Birmingham*, 388 U.S. 307 (1967), because neither of these decisions addressed an individual's obligation to comply with procedures already held unconstitutional. Contrary to the

dissent's view, we believe *Gragg* and *Walker* support the proposition that, absent circumstances where compliance would involve clear physical danger, regulations and laws must be obeyed, even if unconstitutional, unless obedience would prevent a subsequent legal challenge. It is clear that submission by Watson to drug testing would not have mooted a later legal challenge to the testing program. In our view, the dissent advocates a new exception to the well-established "obey then grieve" rule for federal employees. At the most fundamental level, the dissent would apparently hold that rules about compliance are different categorically where constitutional rights are involved. This is judicial creation of new law in which we cannot join.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-3558

GERALD B. WATSON, JR.,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

NEWMAN, *Circuit Judge*, dissenting.

I respectfully dissent, for when I review what happened to Mr. Watson it is clear that the Board has erred. An important question is presented in this case, concerning the relationship of federal employer and employee.

In brief: On August 18, 1988 Mr. Watson's supervisor at the Federal Aviation Administration's field office in Eugene, Oregon told him that he would be given a random drug test that afternoon. The previous February the Ninth Circuit Court of Appeals had held,

in *Railway Labor Executives' Ass'n v. Burnley,* 839 F.2d 575 (9th Cir. 1988) (*RLEA I*), that suspicionless drug testing by government action violates Fourth Amendment rights. Mr. Watson lives and works in the Ninth Circuit. Mr. Watson consulted a lawyer, who advised him that "the test was unlawful under the Fourth Amendment and that he could refuse to take it," quoting the findings of the administrative judge. Mr. Watson's lawyer then spoke with the supervisor and informed him that random drug testing had been held unconstitutional by the highest federal court in the circuit, and that Mr. Watson would not submit to the test.

The testing proceeded that day as announced, and Mr. Watson refused to take the test. However, on the advice of his lawyer, that same afternoon he went to a private testing laboratory, which conducted a drug test. He was found to be drug free, and submitted the results to the agency. The agency does not question the accuracy of this test, and indeed had told Mr. Watson that he was not suspected of illicit drug use.

On August 23, 1988 Mr. Watson filed a civil action in federal district court, challenging the constitutionality of the random testing program. That suit was dismissed for lack of subject matter jurisdiction, the court holding that "the Civil Service Reform Act provides the exclusive forum" for Mr. Watson's challenge. *Watson v. United States,* No. 88-6363-E, slip op. at 6 (D. Or.

Oct. 25, 1988). Meanwhile, on August 31, 1988, Mr. Watson received a notice of proposed removal for failure to comply with the random testing program. He was duly and promptly removed.

Mr. Watson appealed to the Board. At the hearing there was testimony before the administrative judge about why Watson refused to submit to testing; about why Watson decided to have a drug test, albeit privately; about Watson's eleven years of "fully successful" performance; and about the deciding official's choice of penalty. After the hearing, but one month before the administrative judge's decision, the Ninth Circuit decision in *RLEA I* was overruled by the Supreme Court in *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602 (1989) (*RLEA II*), the Court holding that Fourth Amendment rights were outweighed in that case by a reasonable and compelling government interest in safety. The administrative judge reduced Mr. Watson's penalty to a 45-day suspension, stating that he did not credit the deciding official's testimony that he considered penalties other than removal, and finding that various factors, including Mr. Watson's reliance on Ninth Circuit law and the advice of his attorney, weighed against removal. The administrative judge held that the agency could require Mr. Watson to submit to drug testing as a condition of reinstatement.

The agency appealed to the full Board. The Board overruled the administrative judge, and reinstated the agency's removal of Mr. Watson. The Board held that Mr. Watson was required to comply with the agency's order regardless of its legality.

The Board also held that in any event the agency's testing program did not violate the Constitution, citing *Shelledy v. Dept. of Transp.*, No. DE07528810381 (MSPB June 21, 1991) and *American Federation of Gov't Employees v. Skinner,* 885 F.2d 884 (D.C. Cir. 1989) as authority. Both of these cases were decided after the Supreme Court in *RLEA II* overruled the Ninth Circuit decision in *RLEA I*. The Board did not mention either of the *RLEA* decisions.

Neither the Board in its opinion, nor the agency's brief, touches the question of the correctness of requiring Mr. Watson to comply with a governmental order that was unconstitutional and illegal at the time. Instead, the government relies on *Gragg v. U.S. Air Force,* 13 M.S.P.R. 296 (1982), *appeal dismissed sub nom Gragg v. United States,* 717 F.2d 1343 (Fed. Cir. 1983) for the proposition that Mr. Watson was required to obey a supervisory order and, if he wished to challenge it, to do so after he complied with it. All of the governmental

submissions in this court have avoided[1] the sensitive question of requiring compliance with an illegal order when constitutional rights are involved.

Is the official position of our government, as an employer, that a federal employee's obligation is to comply with an unconstitutional order, on pain of being fired? We have been directed to no authority for this proposition. *Gragg,* a 1982 Board decision, did not involve a constitutional ruling of a court; it involved the agency's demand that an employee shave his beard, such demand being contrary to the employees' bargaining agreement. The decision in *Gragg* interprets *Walker v. City of Birmingham,* 388 U.S. 307 (1967) as standing for the proposition that "individuals do not have the

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[1]The majority opinion states that the issue of the propriety of removal based on a refusal to obey an unconstitutional order was not briefed by either party. That is inaccurate. Mr. Watson's brief discusses his "good faith objection to the constitutionality of random testing" based on his reliance on *RLEA I* and on his attorney's advice based on this decision. The government's brief, however, is indeed silent on this issue. Despite Watson's clearly stated argument based on his reliance on the law of the Ninth Circuit, the government avoids all reference to *RLEA I.* Such an omission can only have been deliberate; and indeed, the position that Watson could not rely on the law of the Ninth Circuit is not easily supportable.

unfettered right to disregard a law, rule or regulation merely because substantial reason exists regarding the constitutionality or validity of that law, rule or regulation." *Gragg,* 13 M.S.P.R. at 299. *Walker* held that a court-issued injunction must be respected. Indeed, *Walker* provides solid support for Watson's actions. Both Watson and the agency were obliged to respect a duly issued ruling of the Ninth Circuit.

The majority of this panel states that *Walker* supports the proposition that even an unconstitutional administrative regulation must be obeyed. I can not agree. The Court in *Walker* addressed a situation where petitioners, charged with contempt of a state court injunction, sought collaterally to attack the constitutionality of the injunction as well as the city ordinance on which it relied. These arguments were held to be unavailable to the petitioners because they had not sought orderly judicial review before violating the injunction. The *Walker* majority stated that "[t]his case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts." *Walker*, 388 U.S. at 318.

Walker thus addressed the duty to obey a duly issued court order, not a duty to obey a facially illegal agency order. Further, Mr. Watson had promptly sought orderly judicial review. *Gragg's* interpretation of *Walker* as requiring an employee to shave his beard before filing a grievance is quite different from requiring an employee to acquiesce in a then-unconstitutional search. A federal agency does not have authority to issue an illegal order, and severe punishment for non-compliance with an illegal order is unwarranted. *Estep v. United States,* 327 U.S. 114, 126 (1946) (Murphy, J., concurring). There is no "well-established" rule that federal employees must yield their Constitutional rights when ordered to do so. The "obey now grieve later" rule of *Gragg* may have a place in disputes arising under a collective bargaining agreement, but Mr. Watson's cause arises under the Constitution.

Even in disputes arising under a collective bargaining agreement, the "obey now grieve later" rule has been rejected when an employer's order is illegal: "Apparently the Board believes that an employee given an unlawful order is ... obliged to 'obey and grieve.' We prefer the alternative view that a citizen's first obligation is to obey the law, not the unlawful commands of an employer." *Garcia v. N.L.R.B.*, 785 F.2d 807, 812 (9th Cir. 1986). The majority of this panel too readily finds the "obey and grieve" rule proper under these circumstances.

The question before us is the punishment of Mr. Watson for having relied on the Ninth Circuit decision holding the suspicionless drug-testing program illegal. The panel majority suggests that Mr. Watson could not have reasonably relied on *RLEA I* because the drug-testing program in *RLEA I* was not identical to the program affecting Mr. Watson. Indeed, *RLEA I* involved drug testing only after a "triggering event" such as a railroad accident, whereas the program affecting Mr. Watson required no "triggering event" at all. If a program of suspicionless drug testing after a railroad accident was unconstitutional, then surely a program of suspicionless drug testing with no triggering event was even less supportable.

Until *RLEA I* was overturned by the Supreme Court, Watson was entitled to rely on it. The grant of a petition for *certiorari* does not automatically vacate the prior law, or require those subject to that law to behave as if it had already been reversed. "Unless and until ... reversed or modified" on appeal, even an erroneous decision is "an affective and conclusive adjudication", *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923).

When the law is changed, even retroactively, equity may require adjustment of the remedy when a person has relied on the existing law. *See James B. Beam Distilling Co. v. Georgia,* 111 S. Ct. 2439, 2443 (1991) (Souter, J.). The administrative judge neither exonerated Mr.

Watson entirely, nor ratified the penalty of firing a fully successful employee of eleven years. The Board, however, fired Mr. Watson. It is a travesty of the rule of law to impose this extreme punishment for refusing to comply with an order, the constitutionality of which had been litigated and found wanting at the time the order was issued. It is the Constitution that is the highest law, not an administrative order.[2]

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[2]The concurring opinion states that I "advocate" that "several million federal employees ... routinely and with complete impunity disobey *any* agency order or regulation the constitutionality of which they doubt or which is sub judice", while engaging in "speculative" or "metaphysical debate". (Emphasis in concurrence.) That is a curious interpretation of *RLEA I*, wherein the Ninth Circuit had *already* declared suspicionless drug testing unconstitutional. That ruling was neither speculative nor metaphysical.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-3558

GERALD B. WATSON, JR.,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

MICHEL, *Circuit Judge*, concurring, with additional views.

I agree with the result and reasoning of Judge Rich's opinion in which I join, but add the following further reasons why I find the dissent unpersuasive:

Although seeking to distinguish *Gragg* and the other cases relied upon by the Board, the dissent cites no authority specifically supporting much less requiring the new and far-reaching rule the dissent itself advocates. That rule would allow several million federal employees,

including those like Watson in "sensitive positions," routinely and with complete impunity to disobey *any* agency order or regulation the constitutionality of which they doubt or which is sub judice. One can easily imagine the spread of employee noncompliance with agency orders that such a rule would likely spawn. Whatever its merit as social policy for such a broad and consequential rule to be imposed as judge-made law rather than through legislation, only a constitutional mandate declared by the Supreme Court should suffice. The dissent's failure to cite any Supreme Court decision requiring its rule is therefore a critical deficiency. Presumably, the dissent could not find such supporting authority because the uniform practice requiring federal employees, as a condition of employment, to "obey now" and "grieve later," unless personal safety would be jeopardized, does not in fact transgress any constitutional right. Further, as the proponent of a new constitutional rule that would reverse government-wide practice, the dissent bears a heavy burden of persuasion that I think is not met here. That courts are ill-equipped to predict and evaluate the practical consequences of such rules is only another reason to doubt the rule the dissent would impose.

Nor do I believe the fundamental principle underlying this practice is limited to alleged breaches of collective bargaining agreements, as the dissent suggests. Indeed, often an employee charges that the disputed order or

regulation contravenes both contractual and constitutional rights. Therefore, the so-called "grieve later" rule should be understood broadly to include not only grievances per se but also administrative and judicial challenges to an agency-employer's order.

Watson's refusal to take the drug use test clearly was not based on safety considerations; nor does he even assert that it was. Indeed, if anything, it threatened the safety of passengers whose lives could depend on the quality of Watson's work. The only other broad exception recognized by case law is where compliance with a disputed order would preclude subsequent legal challenge. Clearly, that was not the case here, either.

In any event, the issue the dissent would deem dispositive was not even presented in this appeal. Although Watson did argue below that the "obey and grieve" rule of *Gragg* should be set aside, he waived that argument on appeal. Here, Watson did not argue against application of the rule on the issue of liability, either generally or on the unique facts of his case, but only that the Board should have considered as a mitigating factor on penalty his "good faith belief that random drug testing was unconstitutional."

Again, however, neither Watson nor the dissent has cited any authority holding that an employee's asserted good faith belief in the unconstitutionality of an agency's order must *always* be considered as a mitigating factor by the agency when it selects the penalty for disobeying that order. If we were now categorically to impose this requirement, it should be expected that many personnel actions based on disobedience of an order would degenerate into an extended inquiry into the subjective state of mind of the employee and a speculative, almost metaphysical, debate about the constitutionality of the order, involving premature predictions, often solely by laymen, about future outcomes in pending or expected constitutional test cases. This would hardly improve the efficiency of the service or of MSPB hearings. Nor is it clearly necessary for fairness to employees. None of which is to say, however, there might not be a case someday involving facts that would require that such a belief must be considered in mitigation. But this is not such a case.

Even assuming, arguendo, that the Board was required to consider Watson's asserted good faith belief in the unconstitutionality of the FAA's order and that Watson's reliance on *RLEA I* was justified, neither Watson nor the dissent has shown, based either on factually comparable cases or on the equities of this case,

that the Board abused its discretion by not mitigating his penalty. Hence, if error at all, the Board's failure to weigh Watson's belief was at most harmless error.

Finally, the dissent goes too far in saying that the FAA order here had effectively been held unconstitutional by the 9th Circuit decision in *RLEA I*. For one thing, that case invoked only the government's limited powers as a regulator, not its broader powers as an employer. Other distinctions are noted in Judge Rich's opinion. Therefore, despite the view of Watson's attorney, it was not at all clear that when it issued the employer's order in this case it was unconstitutional, as the regulator's order in that case was temporarily held to be.

In sum, constitutional challenges should not be interposed on the spot by public employees confronted with agency orders they question and wish to challenge. Instead, such constitutional challenges should be brought by employees in due course after compliance, with only the limited exceptions established in case law.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GERALD B. WATSON,	) DOCKET NUMBER
	) SE07528910074
	)
Appellant,	)
	) DATE:JUL 25, 1991
v.	)
	)
DEPARTMENT OF	)
TRANSPORTATION,	)
	)
Agency.	)
	)

Michael McGrady, Esquire, Eugene, Oregon, for the appellant.

Paul S. Smith, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board upon the agency's petition for review and the appellant's cross petition for review of the April 21, 1989 initial decision that mitigated the appellant's removal to a 45-day suspension. For the reasons discussed in this Opinion and Order, the Board GRANTS the agency's petition for review, DENIES the appellant's cross petition for review, and AFFIRMS the initial decision as MODIFIED by this Opinion and Order, SUSTAINING the agency's removal action.

BACKGROUND

The appellant appealed to the Board's Seattle Regional Office from the agency's action removing him, effective December 4, 1988, from his Electronics Technician position with the Airway Facilities Sector Field Office in Eugene, Oregon. The agency based its removal on the charge that the appellant refused to submit to random drug testing. *See* Appeal File (IAF) at Tabs 3(B), 3(F).

The facts surrounding the appellant's removal are undisputed. On August 18, 1988, the appellant's supervisor informed him that he had been randomly selected for drug testing that day. *See id.* The test was to be conducted in accordance with agency Orders 3910.1

and 3910.6, which were issued pursuant to Executive Order No. 12,564, 51 Fed. Reg. 32,889 (1986), entitled "Drug-Free Federal Workplace." The appellant immediately consulted an attorney, who advised him that the random drug testing was unconstitutional under the Fourth Amendment to the United States Constitution and that he was not required to submit to it. Acting on that advice, the appellant refused to take the test. However, on the same day, he went to a private clinic and provided a urine sample, which was sent to a laboratory for testing. The appellant tested "negative" (drug- free).

In his petition for appeal, the appellant denied the agency's charge on the basis that he had submitted to a drug test within the time period specified by the agency. He also contended that there was no nexus between the conduct charged and the efficiency of the service and argued that the penalty was inappropriate. Further, he challenged the constitutionality of the random drug testing. *Id.* at Tab 1.

The administrative judge found the agency's charge supported by preponderant evidence. He based his determination on the undisputed evidence that the appellant refused to provide a urine sample in accordance with the agency's drug-testing program. The administrative judge found no merit to the appellant's asserted defenses for his noncompliance. In this regard, the administrative judge noted that, under the agency's

regulation, the appellant was not permitted to substitute his testing preference for the agency's established procedure. The administrative judge therefore rejected the appellant's contention that he had, in fact, provided a urine sample. He also found without merit the appellant's contention that he was not required to comply with the agency's drug-testing requirement because it violated his rights under the Fourth Amendment. Relying on *Gragg v. United States Air Force,* 13 M.S.P.R. 296, 299 (1982), *appeal dismissed sub nom. Gragg v. United States,* 717 F.2d 1343 (Fed. Cir. 1983), the administrative judge noted that, except in certain limited circumstances where compliance with agency directives might place employees in danger, employees were required to obey agency directives, even if invalid, and challenge them later. *See* Initial Decision at 4-5.

The administrative judge did not specifically address the constitutionality of the agency's random drug-testing program, noting that in *Mode v. Tennessee Valley Authority,* 20 M.S.P.R. 228, 230 (1984), and *Clark v. Department of the Navy,* 20 M.S.P.R. 152, 154 (1984), cases involving the constitutionality of an agency regulation subjecting employees to searches, the Board did not consider that issue. Further, the administrative judge declined to apply equitable estoppel to the agency's argument that the Board should not decide the Fourth Amendment issue. He found that the application of equitable estoppel was not appropriate even though the

agency's attorneys had argued, in a suit the appellant brought in a United States district court to enjoin the agency's random drug-testing program, that the Board would decide the constitutional issue. *See* Initial Decision at 5-6.

The administrative judge next considered the appellant's contentions that no nexus existed between the conduct charged and the efficiency of the service because there was no reason for the agency to believe that he was a drug user, because there was no evidence of deficiency in his performance, and because drug testing neither measured job impairment nor established that drug use caused job impairment. The administrative judge found that there was a causal connection between an employee's refusal to comply with regulations the agency believed were properly promulgated and the efficiency of the service. The administrative judge further found that the fact that there might have been better alternatives to the agency's random drug-testing program did not relieve the appellant of his duty to comply with the program's requirements. *Id.* at 6-7.

As to the appropriateness of the penalty, the administrative judge found that the offense was serious, particularly since the appellant occupied a "safety critical" position and had timely notice of the drug testing and the consequences for refusing to submit to it. The administrative judge found, however, that mitigation

was warranted. After finding that the agency had predetermined the appellant's removal, he found that the appellant's refusal to submit to the agency's drug testing was reasonable, based on his own belief and his attorney's advice that the testing was unconstitutional. The administrative judge noted that the Board had found that objectively reasonable belief, even if mistaken, that one's constitutional rights would be violated by following an agency order could be a mitigating factor. *Id.* at 12.

The administrative judge also considered the appellant's concern with the effect of melanin on his test results,[1] finding that, although less reasonable than his constitutional belief, it was not unreasonable because the theory that caused his concern had once received "apparently respectable support," and because false positive results were possible. He considered the fact that the appellant submitted to drug testing within two hours of the time he was required to submit the urine sample to the agency, and noted that, even though the laboratory he selected was not on the certified list of the

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[1] The appellant, who is black, had argued that he was concerned with the accuracy of the drug testing because of reports that persons with dark pigmentation of the skin were more likely than persons with light pigmentation to test falsely positive for cannabinoids. *See* Initial Decision at 13: Appellant's Exhibit H, IAF at Tab 13.

Department of Health and Human Services (DHHS), it was accredited and was a subsidiary of SmithKline Bio-Science, a laboratory that was on the DHHS list; however, agency officials did not consider the results of this test, which showed the appellant to be drug-free. *Id.* at 13-14.

The administrative judge further determined that the agency could have imposed discipline short of removal and then, under its drug-testing provisions, could have ordered the appellant to undergo follow-up testing or submit to another test before returning to duty. The administrative judge noted that the appellant's refusal to take the test was discreet and that he did not encourage others to refuse drug testing. Finally, the administrative judge found that the appellant's potential for rehabilitation was excellent under the circumstances because of his present willingness to comply with the agency's random drug-testing program. Accordingly, the administrative judge mitigated the penalty to a 45-day suspension. *Id.* at 14-16.

In its petition for review, the agency challenges the administrative judge's finding that mitigation of the penalty was warranted.

The appellant has responded to the petition for review, and has filed a cross petition for review,[2] contending that: (1) The Board should decide the constitutional issue raised in this case; (2) an exception should be made to the "obey then grieve" rule where an employee's fundamental rights may be irreparably injured; and (3) no nexus exists between his refusal to submit to drug testing and the efficiency of the service. The agency has responded to the appellant's cross petition for review.

For facility of discussion, we will address the agency's petition for review and the appellant's cross petition for review in reverse order.

ANALYSIS

The appellant's cross petition for review

With respect to the appellant's Fourth Amendment contention, see Appellant's Brief and Cross Petition for Review at 16, Petition for Review (PFR) File at Tab 3, we find that the administrative judge erred in not addressing the constitutionality of the agency's random

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[2]Although the appellant's submission is captioned "Respondent's Brief and Cross Appeal," we will refer to it in this decision as "Appellant's Brief and Cross Petition for Review."

drug-testing program. In *Malone v. Department of Justice*, 14 M.S.P.R. 403, 406 (1983), the Board held that it had no authority to consider the constitutionality of statutes. The instant case, however, does not involve the constitutionality of a statute. Rather, it concerns the reasonableness of the agency's random drug-testing program. The Board considered this issue in *Shelledy v. Department of Transportation*, MSPB Docket No. DE07528810381, slip. op. at 6-10 (June 21, 1991), and found that the agency's random drug-testing of air traffic control specialists did not violate the constitutional prohibition against unreasonable search and seizure. The Board stated that, in determining whether a search is reasonable, consideration was to be given to the benefits gained from that search. *Id.* at 8. The Board found "that the decrease of the potential catastrophic harm in lives lost resulting from an impaired ATCS justifie[d] the agency's program of testing air traffic control specialists, and, therefore, compel[led] the finding that the agency's program of random drug testing, in these circumstances, was reasonable." *Id.* at 8-9. Moreover, we note that, in *American Federation of Government Employees v. Skinner*, 885 F.2d 884, 891-93, 898 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1960 (1990), the court specifically upheld the constitutionality of the agency's random drug-testing program.

In the instant case, we find, likewise, that the agency's random drug-testing of electronics technicians does not constitute an unreasonable search. The agency stated in the notice of proposed removal that random drug-testing was necessary because the position of electronics technician involved "immense responsibility for the lives and property of others" and that "[c]onstant alertness of mind and soundness of judgment are basic to the position." IAF at Tab 3, Subtab F. The agency also stated that random drug testing was necessary to "preserve the public's and user's confidence" in the aviation system. *Id.*

At the hearing, the agency presented the testimony of its Airway Facility Sector Manager that electronics technicians performed "very critical work" and that they "maintain[ed], calibrate[d] and adjust[ed] facilities, which, if improperly done, could result" in airplane crashes. Hearing Transcript (Tr.) at 27. The agency also submitted various statements relating to the high safety requirement of the appellant's position, including statements from Edward Kelly, Deputy Director of Systems Maintenance Service at the FAA in Washington, D.C., and Melvin Yoshikami, Manager of the Airways Facilities Division of the FAA in Seattle, Washington. IAF at Tab 18. Mr. Kelly explained the functions of an electronic technician, which included "servicing of equipment," "corrective maintenance," and responsibility for "control, navigation, radar and communications

machinery that allow[ed] safe operation and positive control of aircraft both in the sky and on the ground at airports." *Id.*

Mr. Yoshikami stated that, "[i]n order to perform their duties satisfactorily, electronics technicians must be continuously alert and able accurately to examine and maintain complex electronic equipment," and that improper certification of equipment "could result in unsafe conditions directly, and potentially tragically, affecting the national airspace system." *Id.* The appellant does not deny that his position of Electronics Technician involves serious safety responsibilities as stated by the agency. Thus, we find that the random drug-testing of electronics technicians by the agency is reasonable.

We find no merit to the appellant's contention that the "obey then grieve" rule should be suspended in this case. *See* Appellant's Brief and Cross Petition for Review at 14. In *Gragg,* 13 M.S.P.R. at 299, the Board, citing *Walker v. Birmingham,* 388 U.S. 307, *reh. denied,* 389 U.S. 894 (1967), stated that "individuals do not have the unfettered right to disregard a law, rule or regulation merely because substantial reason exists regarding the constitutionality or validity of that law, rule or regulation." It noted, though, that "in certain limited circumstances employees may disobey an order which would place them in a clearly dangerous situation." *Id.*

The circumstances of the instant case do not fall within this exception. Therefore, we find that the appellant improperly failed to obey the agency's instructions.

We also find no merit to the appellant's contention that no nexus was shown between his misconduct and the efficiency of the service. *See* Appellant's Brief and Cross Petition for Review at 13-14. It is well established that refusal to follow proper instructions adversely affects the efficiency of the service. *See Blevins v. Department of the Army*, 26 M.S.P.R. 101, 104 (1985), *aff'd*, *790* F.2d 95 (Fed. Cir. 1986) (Table): *Gragg*, 13 M.S.P.R. at 301. The appellant's refusal to comply with his supervisor's order to submit to drug testing in accordance with the agency's random drug-testing program constituted a refusal to follow proper instructions. Therefore, a nexus existed between the appellant's misconduct and the efficiency of the service.

The agency's petition for review

The agency challenges virtually every basis on which the administrative judge relied in finding that mitigation of the penalty was warranted. The agency contends that the administrative judge erred in finding that it accorded better treatment to employees who tested positive for drugs than to those who might have been drug free, but who refused drug testing. It argues that it is obligated to provide reasonable accommodation to employees

suffering from a drug-addiction handicap, but that, when employees refuse to take the drug test, it cannot determine whether they are entitled to reasonable accommodation. See Agency's Petition for Review at 10-11, PFR File at Tab 1. We find that the administrative judge's comparison between drug-addicted handicapped employees and employees who refuse drug testing is inapposite inasmuch as different types of misconduct and procedures are involved.

The agency also contends that the administrative judge erred in relying on a statement by a government attorney in the motion for injunction brought by the appellant in the Federal district court. Agency's Petition for Review at 11. That attorney stated that, if the appellant prevailed, the agency's drug-testing program might be jeopardized. The agency contends that the attorney's statement was not probative of the issues raised in the instant case, that the attorney was not the agency's deciding official, and that the deciding official had no contact with that attorney. *Id.*

The administrative judge referred to the statement in question in addressing the issue of whether the agency had predetermined the penalty. *See* Initial Decision at 9. In this regard, the administrative judge found that the agency had predetermined the appellant's removal based on the evidence of record, including: (1) The attorney's argument before the district court that the drug-testing

program might be jeopardized if the appellant prevailed; (2) the agency's drug-testing order and guidelines providing that an employee who refused to provide a urine sample would be removed; (3) the statement of the agency's coordinator for the drug program that removal was the general rule for such refusal even though the employee had a good work record and no prior discipline; and (4) the testimony of the proposing/deciding official that he did not prepare either the proposal notice or the decision letter and was not aware of the circumstances surrounding the appellant's refusal to submit the urine sample. *See* Initial Decision at 9- 11.

The record does not support the administrative judge's finding that the agency had predetermined the penalty. Melissa Allen, the agency's Deputy Assistant Secretary for Administration, submitted an affidavit in regard to this issue. *See* Appeal File, Tab 18, Agency Exhibit No. 14. In her affidavit, Ms. Allen averred that the agency's procedures required the initiation of action to remove an employee who occupied a safety or security sensitive position and who refused to provide a urine sample for an agency-administered test. She noted that Chapter X, Section III.B., of the Drug Testing Guide stated that the supervisor should initiate action to remove an employee for failure to take a drug test. *See id*; Agency Exhibit No. 12. The initiation of a removal action, however, is not equivalent to mandating removal.

Ms. Allen further averred as follows:

> The Department also recognizes that the ultimate decision concerning the appropriate type of disciplinary action that may be imposed depends upon the circumstances of each individual case. In fact, I am aware that in the case of at least two DOT employees who refused to submit to a random drug test and received notices of proposed removals, the respective deciding officials ultimately determined that removal was unwarranted and lesser penalties were imposed.

Agency Exhibit No. 14.

Additionally, the deciding official testified that he had not been directed by anyone to remove the appellant and that he considered mitigation of the penalty. *See* Tr. at 24-25, 26. While he stated that he felt his discretion was somewhat limited by the drug program's disciplinary provisions, he felt that he had the authority to assess the appropriate penalty. *Id.* at 25, 35. He gave two specific examples of circumstances he felt would have warranted a lesser penalty and stated that he would consider any other reason offered to him. *Id.* at 32-33, 37.

The administrative judge erred in concluding that the fact that the deciding official listed only two specific mitigating circumstances showed that he failed to properly consider mitigation. It is not a deciding official's responsibility to provide a list of circumstances that might have caused him to adopt a lesser penalty. Rather, the deciding official is only required to consider all of the relevant mitigating factors that actually exist in a given case and exercise management discretion within tolerable limits of reasonableness. *See Spearman v. United States Postal Service,* 44 M.S.P.R. 135, 141 (1990); *Gleason v. Department of the Army,* 38 M.S.P.R. 547, 550 (1988). In the instant appeal, the deciding official testified that he considered mitigation but believed that the offense was very serious, that if a lesser penalty were imposed it would render the agency's drug program ineffective, and that it would send a message to the work force that employees could avoid taking the drug test. Tr. at 26-27, 29. Thus, we find that the deciding official properly considered the appropriateness of the penalty and that the administrative judge's conclusion that the deciding official "had merely gone through the motions of decision-making" is unsupported by the record. Initial Decision at 9-10. Likewise, we find unsupported by any legal or other authority the administrative judge's determination that the deciding official's lack of personal knowledge of the case and the fact that he did not prepare either the proposal or the removal notices constituted mitigating factors. *See*

Initial Decision at 10-11. *Cf. Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981) (the Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness).

Additionally, we find that the appellant received timely and adequate notice of the test and was clearly on notice of the consequences of his failure to submit to the test. *See* Appeal File, Tab 3(F). The appellant's reliance on his attorney's advice is unpersuasive as a mitigating factor because it is well established that an employee must obey a proper supervisory order and challenge it later. *See Gragg*, 13 M.S.P.R. at 299. The appellant's action of taking a drug test on his own did not constitute compliance with his supervisor's orders, and sanction of such behavior would seriously undermine the agency's drug-testing program. In this regard, we disagree with the administrative judge's statement that a lesser penalty would not affect the drug-testing program because the appellant had been discreet. We find that this view is unrealistic inasmuch as such a matter generally becomes common knowledge among the workforce and would tend to influence other employees' behavior.

Finally, we note that the administrative judge relied heavily on his assessment that the appellant was a good prospect for rehabilitation, in large part because the administrative judge determined that the appellant had subsequently indicated his willingness to comply with the agency's drug-testing program. The appellant, however, did not give an unqualified statement that he would comply. At the hearing, the appellant was asked if he was refusing to take the test at that time. He answered, "No." When asked why he had changed his position, he stated:

> I have a little better understanding about it, about the whole program. I think that if I was going to random urinalysis from the Government now, I think that I would insist -- I wouldn't request, but I would insist -- on having a sample sent to a laboratory of my choice, or I would escort them with a sample of my urine to a laboratory of my choice so that I could make sure that their system is reliable.

Tr. at 49.

The appellant's testimony is not an unqualified statement of his intent to comply with future orders. Rather, it seems to impose a significant condition and change the agency's program. Thus, we find distinguishable from the instant appeal the Board's

decisions in *Mode*, 20 M.S.P.R. at 231, and *Grissom v. Tennessee Valley Authority*, 7 M.S.P.R. 387, 388 (1981), upon which the administrative judge relied in finding that the appellant's "objectively reasonable, albeit mistaken, belief" that the agency's drug-testing program violated his constitutional rights was a mitigating factor to be considered in determining the reasonableness of the penalty. *See* Initial Decision at 12-13. In *Mode*, 20 M.S.P.R. at 231, the Board found that the appellant was unaware that he could have obeyed the agency's order and then taken appropriate action to determine his constitutional rights but that, once he understood his rights, he would not continue to refuse to comply with the agency's directive. In *Grissom*, there was no indication that the appellant would continue to refuse to comply with the agency's orders. In the present appeal, however, the evidence indicates that the appellant, who now understands his rights, will continue to refuse to fully comply with the agency's drug-testing program. Thus, he lacks a good potential for rehabilitation. *Mode*, 20 M.S.P.R. at 231.

Therefore, despite the favorable mitigating factors, including the fact that the appellant tested negative for drug use, and his 11 years of satisfactory service, we

find that removal was reasonable under the circumstances of this case.[3] *See Douglas*, 5 M.S.P.R. at 306.

ORDER

This is the Board's final order in this appeal. *See* 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

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[3]In finding the penalty of removal warranted in the instant case, we note the agency's contention, in its response to the appellant's cross-petition for review, that the administrative judge issued inconsistent decisions as to mitigation of the penalty in this case and in *Nichols v. Department of Transportation*, MSPB Docket No. SE07528910208 (Initial Decision, June 28, 1989), *petition for review denied*, 43 M.S.P.R. 154 (1989) (Table). We need not consider this contention here, however, because we have found that mitigation of the penalty is not warranted and also because initial decisions do not have precedential effect. *See Clark v. Department of the Navy*, 12 M.S.P.R. 428, 429 (1982).

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: /s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SEATTLE REGIONAL OFFICE

GERALD B. WATSON, JR.,	) DOCKET NUMBER
	) SE07528910074
	)
Appellant,	)
	) DATE: April 21, 1989
v.	)
	)
DEPARTMENT OF TRANSPORTATION,	)
	)
Agency.	)
	)

Michael McGrady, Esquire, Eugene, Oregon, for the appellant.

John J. Callahan and *Paul S. Smith,* Esquires, Seattle, Washington, for the agency.

BEFORE

John W. Tapp
Administrative Judge

INITIAL DECISION

INTRODUCTION

On December 22, 1988, Gerald B. Watson, Jr., appealed to the Merit Systems Protection Board (the Board) from the action of the Federal Aviation Administration (FAA) removing him, effective December 4, 1988, from his position as an Electronics Technician with Airway Facilities Sector Field Office in Eugene, Oregon. The agency's action was based on a charge of "refusal to provide a urine specimen as a part of a random drug test authorized by Executive Order 12564" and by two agency orders.

The Board took jurisdiction over the appeal pursuant to 5 U.S.C. §§ 7511(a)(1)(A), 7512(1), 7513(d), and 7701(a). At appellant's request, a hearing was held on March 9, 1989, in Portland, Oregon.

For the reasons explained below, the agency action is MITIGATED to a forty-five (45) day suspension.

ANALYSIS AND FINDINGS

Legal standard

To sustain an adverse action before the Board, an agency must establish, by a preponderance of the evidence, that there is a factual basis for the conduct charged and that disciplinary action, based on the proven conduct, promotes the efficiency of the service. *See* 5 U.S.C. §§ 7513(a) and 7701(c)(1)(B). The "efficiency of the service" requirement includes a showing that *some* disciplinary action is warranted (the "nexus" requirement) and that the *particular* penalty is within the limits of reasonableness. Thus, three distinct elements must be proven in any adverse action. *Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 302-3, 306 n.67, 307-8 (1981).

Background facts

Around noon on Thursday, August 18, 1988, appellant was informed by his supervisor, Dean Stead, that he had been randomly selected for drug testing that

day.[1] At that time, appellant had been with the FAA as an Electronics Technician in Eugene, Oregon, for almost eleven years.

All of his performance appraisals during that time had been "fully satisfactory." The test was not related to appellant's performance. Mr. Stead had no reason to suspect that appellant was using drugs. Selection of appellant for testing was totally random. See stipulations #1, 2, 12, and 14b. (Board file tab 16).

The test was being conducted pursuant to agency Orders 3910.1 and 3910.6 (agency tab L), both relating to maintenance of a drug-free workplace as directed by Executive Order 12564, 51 Fed. Reg. 32889 (1986), "Drug-Free Federal Workplace" (agency tab K). (Board file tab 3). The agency had implemented its program in September 1987. It provided for random testing of FAA employees in "safety and security critical positions."

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[1]Accounts of the events of August 18, 1988, were consistent with each other. *See, e.g.*, handwritten memo by Dean Stead (agency file tab G, under Board file tab 3); hearing testimony of appellant (transcript, pp. 46-48); and stipulation #14 (Board file tab 16). I found no reason to doubt appellant's account of his separate activities.

The drug testing personnel were at lunch when Mr. Stead talked with appellant at noon on August 18. Stead told appellant to return at 1:30 p.m.

Appellant checked the telephone book for a lawyer specializing in constitutional issues and reached Michael McGrady, his present representative. Mr. McGrady advised appellant that the test was unlawful under the Fourth Amendment and that he could refuse to take it. Appellant agreed and retained McGrady. He returned to work at approximately 1:00 p.m. to have Stead call McGrady. McGrady informed Mr. Stead of appellant's position.

Very shortly thereafter, at McGrady's request, appellant went to the White Bird Clinic in Eugene, Oregon. At 3:30 p.m., he provided a urine sample. That sample was sent to the International Clinical Laboratories (ICL) in Seattle, Washington, where it was tested using thin layer chromatography. *See* Declaration of Dr. Teh Wang. (Board file tab 19). Appellant tested "negative" (drug free) for twelve specified illegal drugs including marijuana (cannibinoid) and cocaine. *See* test results, appellant's exhibit E. (Board file tab 13). These results were given to the agency on August 23, 1988. (Appellant's testimony, Tr. 48).

Also on August 23, 1988, appellant filed for declaratory and injunctive relief in U.S. District Court. On August 31, 1988, the agency proposed appellant's removal. (Agency tab F).

On October 5, 1988, Mr. McGrady responded in writing to the proposal on appellant's behalf. (Agency tab D). Therein, Mr. McGrady stated, at page 2, that if appellant did not prevail in his constitutional challenge, he would "submit to any future random testing required by the agency."

By "Opinion" dated October 24, 1988, Judge Helen J. Frye granted the government's motion to dismiss appellant's Federal court challenge on the ground that the Civil Service Reform Act (CSRA) provided the exclusive remedy for appellant, including his constitutional claim. (Agency tab C). By letter dated November 10, 1988, the agency advised appellant that he was being removed from employment. (Agency tab B). Donald G. Coones, Manager of the Portland Airway Facility Sector, was the proposing and deciding official. At the Board hearing, appellant testified that he refused the test, on the advice of his attorney, because he felt it violated his Fourth Amendment right to be safe from unreasonable searches. At the time of the test, he was also concerned about the possibility of a "false positive" due to unreliable testing procedures. In this regard, he had been under the impression that black people, such as himself, were more

likely to test positive for cannabinoids due to the presence of melanin in their skin pigmentation. (Tr. 45-46). Finally, he testified that, based on information he had acquired since his removal, he would not now refuse to submit to random testing. (Tr. 55-56).

Proof of conduct

There is no question that appellant refused to provide a urine specimen as required by the agency's drug-testing program. In his reply to the agency's removal proposal and in his appeal petition (Board file tab 1), appellant argued that, by providing a urine sample to the White Bird Clinic within the time frame mandated and by giving the ICL test results to the agency, he essentially complied with the agency's requirement and thus there was no "refusal."

Appellant did not press this argument as the appeal progressed and with good reason. An employee does not have discretion to substitute his preferred approach for the agency's required procedure. While appellant's "alternative test" can and should be considered in assessing the reasonableness of the penalty, it does not render him innocent of the conduct charged. He did not provide a urine sample "as a part of" a random drug test authorized by Executive and agency orders.

Appellant's only other defense was that he was not obligated to comply with the agency's requirement because it violated his rights under the Fourth Amendment. Employees are required to comply with agency orders or directives, even if they are invalid, and challenge them later through appropriate means. *See Gragg v. United States Air Force,* 13 M.S.P.R. 296, 299 (1982) (employee does not have the right to disregard an order merely because there is substantial reason to believe it is not proper; except in certain limited circumstances where obedience would pose clear danger, employee must first comply with the order and then register his complaint or grievance), *appeal dismissed sub nom. Gragg v. United States,* 717 F.2d 1343 (Fed. Cir. 1983).

Appellant argued that the *Gragg* rule should not apply where failure to obey is based on a constitutional claim. I find no support for that argument. To the contrary, in at least two cases, the Board has refused to reach a constitutional claim under similar circumstances.

In *Mode v. Tennessee Valley Authority,* 20 M.S.P.R. 228, 230 (1984), the Board refused to determine whether a regulation subjecting employees to unannounced searches was lawful, stating that the *Gragg* rule applied. And in *Clark v. Department of the Navy,* 20 M.S.P.R. 152, 154 (1984) the Board refused to determine the legality of a search, saying the appellant had no right to

resist the officers' request "even assuming the invalidity of their search."

Finally, appellant argued that the agency should be estopped from arguing that the Board should not reach the Fourth Amendment claim because agency attorneys, including Paul Smith, one of the two agency representatives for this appeal, argued for dismissal of appellant's Federal court action on the ground that the Board would decide the issue and was, in fact, the exclusive avenue of relief. I agree that the agency did make that argument. *See* "Transcript of Telephone Conference Proceedings before the Honorable Helen J. Frye," pp. 4 and 25, appellant's exhibit D. (Board file tab 13).

I do not, however, feel application of estoppel is appropriate. First, there is no evidence that the agency's attorneys knowingly misrepresented the Board's jurisdiction or authority. Second, the Board's case law was available to appellant's counsel (and the Court) at the time of the U.S. District Court proceeding. And, third, if the Court was either misled and/or erroneous in its ruling, appellant assumedly may, and more logically should, return to that forum for relief.

Thus, I find that appellant did refuse to provide a urine specimen as charged and that his refusal was actionable regardless of the constitutional validity of the agency's random drug testing program.

Nexus

Appellant argued there was no nexus in this case. In essence, his argument was that 1) the agency had no reason to believe he was in any way involved with illegal drugs, 2) there was no evidence of any deficiencies in his job performance, and 3) regardless, drug testing does not measure job impairment nor can it establish cause and effect.[2]

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[2]Appellant also proffered a statement by Dr. Herbert H. Severson to demonstrate that employers could develop objective psychological and neuropsychological tests which actually measure performance impairment, thus allowing inquiry into the cause. These could be used in lieu of drug tests which, in effect, presume a cause (drug use) which may affect performance. See appellant's exhibit C. (Board file tab 13). This statement was originally offered and accepted before I ruled that I would not address the Fourth Amendment issue. It was offered to establish there were other less-intrusive and more directly performance-related means to test for on-the-job impairment.

In *Mode v. Tennessee Valley Authority*, 20 M.S.P.R. at 230-31, the Board rejected a finding of no nexus where an employee refused to sign a consent to search form. The presiding official had found that an adverse action based on an employee's failure to consent to something which the agency already had the authority to do did not promote the efficiency of the service. The Board reversed this finding, however, stating that:

> there is a causal connection between an employee's refusal to comply with what the agency believes are properly promulgated instructions and the efficiency of the service. Failure to follow instructions or abide by requirements impacts on the agency's ability to carry out its mission. Further, the agency believes that smooth operation and administration of its security functions demands that every employee agree to the search provisions, and has effectively made such agreements a condition of employment. [cite omitted].

Likewise, in this case, the agency has promulgated a program, pursuant to an Executive Order mandating a drug-free workplace, which includes random testing. This testing has become a condition of employment. The fact that there may be better and less intrusive means to achieve the same end does not change that fact. As long

as the random drug testing program is in place, all employees must comply with it or be prepared to accept the consequences of an adverse action for cause which promotes the efficiency of the service.

Reasonableness of the penalty

In *Douglas,* 5 M.S.P.R. at 305-6, the Board held that its role was not to insist on a specific, appropriate penalty but, rather, to assure that the agency conscientiously considered all relevant factors and selected a penalty which was within the tolerable limits of reasonableness.[3] To assist in this review, the Board provided a number of non-exclusive factors which would normally be pertinent. After reviewing the relevant factors in this case, I find that the agency abused its discretion and that the penalty is beyond the tolerable limits of reasonableness.

Before turning to the penalty discussion *per se,* I must address two issues. The first is the nature of the offense. In the context of hearing preparations and settlement discussions, I characterized the offense as a type of insubordination for purposes of assessing the reasonableness of the penalty.

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[3]This is essentially an "abuse of discretion standard." *See Beard v. General Services Administration,* 801 F.2d 1318 (Fed. Cir. 1986).

In his Post-Trial Brief, appellant argued that his conduct did not constitute insubordination. The agency, in its Post-Trial Brief, argued that appellant's conduct was essentially a refusal to report for a fitness-for-duty exam and relied on cases involving that charge to support removal.

The parties' arguments have convinced me that I erred by analogizing the charge in this case. It was unnecessary and inappropriate and has led the parties off on tangents. The agency charged appellant with refusal to provide a urine sample, not insubordination. I do not find the agency's analogy to fitness-for-duty exams appropriate. Cases in that area involve a refusal to obey an order or a directive arising from specific problems with an individual employee's performance or conduct.

The second issue is whether the penalty of removal was predetermined. There was certainly a significant amount of evidence which suggests that the agency has made an institutional decision, both explicit and implicit, that removal is the only possible penalty for refusal to consent to drug testing. This determination apparently rests on a belief that failure to remove a refusor will destroy the entire random testing program.

For example, the agency's Appendix I, Order 3910.1, "Drug Free Departmental Workplace," dated June 29, 1987 (agency tab L) and the DOT "Drug

Testing Guide," dated March 31, 1988 (agency exhibit 12, Board file tab 18), essentially set up a program whereby an employee who tests positive for illegal drugs will be reassigned to non-safety sensitive duties, referred for rehabilitation, and returned to work once rehabilitation is completed with special follow-up testing for one year. *See* Appendix I, Chap. III, § 4-G and Chap. IV, §§ 1 and 5 and "Guide," Chap. X, § IV-A. No such contingencies exist for an employee who, for whatever reason, refuses to provide a urine sample. That employee "will be removed from the Federal service." *See* Appendix I, Chap. VI, §1-C. *See also* "Guide," Chap. X, §§ III-B and C.

In his argument to U.S. District Judge Frye, agency attorney Richard Lepley stated:

> I don't think one is suggesting that plaintiff [appellant] is using illegal drugs here. What is at stake is the entire program, the entire non-particularized suspicion program that Congress, the President, and the agencies have worked so long and so hard to develop. If we allow the plaintiff to avoid random testing or to refuse to submit to such testing, it will really grind to a halt the entire program and the only ones we'll

> test are non-users since any drug use [sic] will simply refuse to submit because they know they wouldn't be penalized. (Transcript, p. 8, appellant's exhibit D).

And, in her March 6, 1989, "Declaration," Melissa J. Allen, Deputy Assistant Secretary for Administration and national coordinator of the agency's Drug Free Departmental Workplace Program, reasons that, if any employee refuses to comply with drug testing procedures, management will be unable to ascertain the employee's continuing fitness for duty. Thus, she states, in the last two pages of her declaration, that:

> although I am aware that the FAA and other operating administrations in DOT have issued employee conduct and discipline regulations (including tables of penalties), it is important to point out that the Department, in issuing DOT Order 3910.1 and the DOT Drug Testing Guide, intended to limit agency discretion at the proposing official level to propose disciplinary action other than removal in the case of a refusal to submit to a required drug test...given the responsibilities of those employees subject to random drug testing and the serious nature of such insubordination, the Department remains firm in its belief that removal from the Federal service is warranted as a general rule...even if

> those employees previously had good work records and no prior discipline.

The agency representatives in this appeal made the same argument. *See* agency briefs. (Board file tabs 25 and 26).

Finally, Donald Coones, purportedly the proposing and deciding official in this case, left me with the clear impression that he had merely gone through the motions of decision-making. In response to the agency representative's question whether he had "felt constrained by the program's requirement for removal," he responded, "to some point" (Tr. 35-36), but still maintained he had discretion to select a lesser penalty. (Tr. 25). I did not find him convincing on this point. Neither his affect, his demeanor, nor the substance of his responses suggested that he had in fact exercised any discretion.

He did not prepare either the proposal letter (Tr. 19) or the decision letter. (Tr. 23). As to the latter, Coones' testimony was as follows:

> Q . . . What were the circumstances surrounding its preparation, the background, if you will?
>
> A I really know very little about that as personal direct knowledge because I was

> waiting on Vern Harkins to provide it. He had various problems, I think, with getting it cleared and getting it through whoever had to approve it.

Coones repeated the standard agency rationale for removal, beginning as follows:

> Well, a major consideration was that this was a job performance related incident. There's a condition of employment within the FAA as an Airway Facilities Technician. He certifies facilities. He has to submit to a drug test. And he, according to all the information that I had, had not only willfully [sic] refused to submit, but he -- I'm sorry. I lost my train of thought. (Tr. 26)

See also Tr. 29, 33-34.

The only mitigating circumstances he would have accepted were appellant admitting he was a "user" and agreeing to go into rehabilitation, or appellant establishing lack of notice that the test was required. (Tr. 24, 32, 36-37). Coones was not aware of any of the details regarding the drug test appellant took (Tr. 37-38) and it "[p]robably would not have changed [his] decision" even if the test was accurate and reliable. (Tr. 41).

Thus, it is certainly questionable whether there was any consideration of the specific facts of this case in arriving at the penalty. *See Douglas,* 5 M.S.P.R. at 303 ("fundamental requirement that agencies exercise responsible judgment in each case, based on rather specific, individual considerations, rather than acting automatically on the basis of generalizations unrelated to the individual situation.").

However, even if I assume, for purposes of this decision, that Coones, or someone in the agency, considered the relevant factors and exercised some judgment, the penalty is still beyond the tolerable limits of reasonableness.

It is true that appellant had adequate and timely notice of the drug-testing requirement and the consequences of refusal to comply. *See* agency exhibits 1 and 2, and stipulation #15. It is likewise true that refusal to comply with agency requirements generally, and a drug testing program in particular, is a serious kind of offense, especially where, as here, appellant

occupied a "safety critical" position.[4] However, there are a number of more significant mitigating factors.

First, there is little doubt that appellant's refusal was based largely on a belief that random testing was an unconstitutional invasion of his rights under the Fourth Amendment. I found credible appellant's testimony that he originally discussed the matter in September 1987 with a lawyer for the American Civil Liberties Union (ACLU), Dave Fidancke, who told him that random searches were unconstitutional. (Tr. 45-46). And, it is uncontested that Mr. McGrady, a lawyer specializing in constitutional issues, advised appellant that he could refuse to be tested for this reason. Thus, appellant had an objectively reasonable basis for his decision to refuse.

The lawyers' advice, though ultimately wrong, was not unreasonable.[5] Although employee drug testing appears to be gaining general approval in the courts, this

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[4]*See, e.g.*, stipulations #2-10; March 3, 1989, "Declaration of Melvin Yoshikami" (agency exhibit 16); March 7, 1989, "Declaration of Edward M. Kelly" (agency exhibit 15); and appellant's testimony (Tr. 50-54).

[5]It was wrong because appellant is subject to the "obey now, contest later" rule, a rule that only lawyers specializing in labor law or personnel work might reasonably be expected to know.

is a fairly recent development. Such testing continues to be viewed with skepticism in many sectors of our society.[6] And not all members of the Supreme Court are willing to sanction such testing. *See, e.g.*, dissenting opinions of two Justices in *Skinner v. Railway Labor Executives' Association*, 57 U.S.L.W. 4324, 4333 (U.S. Mar. 21, 1989) (testing of railroad workers after an accident), and of four Justices in *National Treasury Employees Union v. Von Raab*, 57 U.S.L.W. 4338, 4344 (U.S. Mar. 21, 1989) (suspicionless testing of employees seeking promotion to positions involving interdiction of illegal drugs or requiring carrying of firearms). The Supreme Court has not yet decided a case involving pure random testing. The lower courts have struggled mightily with this issue. *See, e.g., Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988) (mandatory agencywide urinalysis testing of firefighters without reasonable suspicion violates Fourth Amendment), and cases collected therein, at 1544-45; *panel decision vacated and rehearing en banc granted*, 861 F.2d 1388 (1988).

Thus, I conclude that appellant had a genuine and objectively reasonable, albeit mistaken, belief that he could legitimately refuse testing on Fourth Amendment grounds. In at least two cases, the Board has relied upon

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[6]*See, e.g.*, the authorities collected as appellant's exhibit H, under Board file tab 13.

such a belief as a significant mitigating factor in generally similar circumstances. *See Mode,* 20 M.S.P.R. at 231 (removal mitigated to 30-day suspension for refusing to sign consent-to-search form where employee's belief that he was being deprived of his constitutional rights "a matter of serious concern to him"), and *Grissom v. Tennessee Valley Authority,* 7 M.S.P.R. 387, 388-89 (1981) (removal mitigated to a 15-day suspension for foreman's refusal to allow routine search of vehicle in parking lot where employee had "a deep conviction that the agency was acting unconstitutionally").

Appellant's distrust of the accuracy and reliability of the program was perhaps less reasonable, but still not unreasonable. The "melanin problem," though now discounted, once had apparently respectable support. *See* Dubowski, "Drug-Use Testing: Scientific Perspectives," 11 *Nova L. Rev.*, 415, 516-17 (1987). (Appellant's exhibit H). And, as several articles submitted by appellant (exhibit H) demonstrate, many reputable authorities still believe that even state-of-the-art drug testing is not foolproof. False positives are still a possibility. And, while appellant could have been more diligent in doing the investigation that would have allayed his fears on this score, his skepticism that the agency could and would objectively evaluate its own program was understandable, especially given the *New York Times'* account of the agency's alleged duplicity in

regard to fabricated findings from an earlier drug-testing program. *See* appellant's exhibit G. According to appellant, ACLU attorney Fidancke gave him a copy of this article during their September 1987 meeting.

The agency representatives' argument that appellant had to be removed because, without the agency's test, a determination could not be made as to whether appellant was fit for duty is specious. First, appellant had performed in a satisfactory manner in the same position for all eleven of his preceding years with the agency and there was no reason to believe he was using drugs.

Second, appellant did submit to a drug test within two hours of the time he was to provide a urine sample for the agency. From all appearances, that test was as accurate and reliable as the agency's. *See* "Declaration of Dr. Teh Wang," appellant's exhibit B (Board file tab 19), and "Declaration of Verna Fowler," appellant's exhibit A (Board file tab 13). These documents indicate that appellant's private test employed all the accepted procedures. And, while the specific laboratory which actually performed the test (ICL) is not on the Department of Health and Human Services' certified list, Dr. Wang states that it is otherwise accredited. He also states that it is a subsidiary of SmithKline Bio-Science which I note *is* on the list. *See* 54 Fed. Reg. 7475 (Feb. 21, 1989), agency exhibit 10. This alternate test did not obviate the need for discipline, but it was strong

evidence that appellant was in fact drug-free and that he was acting in good faith on his Fourth Amendment challenge. Yet agency officials showed no interest in the test, or its results, whatsoever.

Third, if appellant had been returned to his position after discipline short of removal, the agency's drug-testing provisions provide for unannounced follow-up testing for one year. *See* Appendix I, § 4-G. Assumedly, the agency could even have required appellant to submit to another test before his return to duty and again taken discipline, this time more severe, if appellant did not comply.

Under these circumstances, appellant's refusal could not have left the agency uncertain about his fitness for duty and it did not deprive the agency of the means to monitor his future fitness on a regular basis.

Nor would discipline short of removal "grind to a halt the entire program." As the Board stated in *Grissom,* 7 M.S.P.R. at 388-89, in response to a similar agency argument:

> We doubt that the reduction of the respondent's penalty would have this effect since the agency is free in each case to impose a suspension and would be free to impose any appropriate penalty upon further violations.

Here, not only would the agency have the previously-mentioned authority to conduct unannounced follow-up testing of refusors, but there is no requirement that the agency merely suspend other refusors, unless their cases present the same, or equally compelling, circumstances calling for mitigation.

Along these same lines, there is no evidence that appellant has attempted to encourage other employees to refuse testing, nor has he done anything to publicize his act of disobedience. To the contrary, from all appearances, appellant has been discrete and has confined his activities to legal forums.

Further, appellant is an excellent prospect for rehabilitation. He did not commit his offense maliciously or for personal gain. He did not know, at the time he refused to comply, that he could submit to the test and still challenge its legality. Having learned that, and having satisfied himself of the accuracy and reliability of the agency's program, he has indicated his present

willingness to comply. Thus, he is an excellent candidate for rehabilitation.[7] *See Mode,* 20 M.S.P.R. at 231.

Thus, I find that, considering all the relevant factors -- most notably, appellant's eleven years of satisfactory service, the principled basis for his refusal, the fact that he is drug-free, and his good potential for rehabilitation -- removal is beyond the tolerable limits of reasonableness. The maximum reasonable penalty is a suspension. *See Id.*, and *Grissom,* 7 M.S.P.R. 387. *See also Depte v. United States,* 715 F.2d 1481, 1483 (Fed. Cir. 1983) (Board's presiding official reduced removal to a 90-day suspension for a food service worker who resisted and assaulted a VA police officer who had probable cause and was attempting to search her for theft). The agency did not consider all the relevant factors and abused its discretion in imposing removal.

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[7]Appellant did have one prior 3-day suspension for "obscene language to a supervisor" in 1982. However, no details of this offense were presented and the agency did not appear to rely on it in arriving at the penalty in this case. It is remote in time and there is no evidence to suggest that it is part of a pattern of defiance to authority generally.

DECISION

The agency's action is MITIGATED to a forty-five (45) day suspension.

ORDER

The agency is ORDERED to cancel the removal and substitute in its place a *45* day suspension without pay. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

The agency is also ORDERED to issue a check to appellant for the appropriate amount of back pay, with interest, and benefits in accordance with the Office of Personnel Management's regulations, no later than 60 calendar days after the date this initial decision becomes final. Appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, the agency is ORDERED to issue a check to appellant for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

The agency is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its efforts to comply.

FOR THE BOARD: /s/ John W. Tapp
John W. Tapp
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on *May 26. 1989*, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 30 calendar days after the date this initial decision becomes final.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees by filing a motion with this office no later than 20 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 U.S.C. § 7701(g), 5 C.F.R. § 1201.37(a), and applicable case law.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a motion with this office no later than 30 calendar days after the date of the agency's notification of compliance.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-3558

GERALD B. WATSON, JR.,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

O R D E R

O R D E R

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the PETITIONER, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED, and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on January 5, 1993. Circuit Judge NEWMAN would rehear the appeal.

Dated: December 29, 1992

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

By /s/ Diane M. Frye
Diane M. Frye
Chief Deputy Clerk

cc: JOEL S. DEVORE
ALLEN D. BRUNS

WATSON V TRANSPORTATION, 91-3558
(MSPB - SE07528900741-1

Note: Pursuant to Fed. Cir. R. 47.8, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-3558

GERALD B. WATSON, JR.,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Judgment

ON APPEAL from the Merit Systems Protection Board

in CASE NO(S). SE07528900741-1

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

DATED NOV 18 1992

ENTERED BY ORDER OF THE COURT
/s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

COSTS: Against, Petitioner.
PRINTING ----------$292.16
TOTAL ----------$292.16
ISSUED AS A MANDATE: January 6, 1993

CHAPTER VI

DISCIPLINARY ACTION

SECTION 1. *GENERAL.*

Disciplinary action as set forth below will be taken under each of the described circumstances:

A. **Refusal to Enter or Successfully Complete a Rehabilitation/Abatement Program.** If an employee refuses to enter or successfully complete a rehabilitation/abatement program, he or she will be removed from the Federal service for illegal off-duty drug use.

B. **Repeat Usage.** In all cases of illegal off-duty drug use, employees who test positive a second time, or for whom a second determination of illegal drug use has been made, will be removed from the Federal service.

C. **Refusal to Provide a Urine Specimen.** An employee who refuses to provide a urine specimen or otherwise refuses to cooperate with the collection procedures will be removed from the Federal service.

D. **Adulteration or Substitution of Specimen.** An employee who adulterates, substitutes or otherwise attempts to falsify the results of a urinalysis will be removed from the Federal service.

E. **On-duty Use of Illegal Drugs.** On-duty use or possession of illegal drugs by an employee will result in removal from the Federal service.

F. **Other Drug-related Offenses.** A determination that an employee has engaged in illegal drug trafficking, e.g., sale, manufacture, growing, distribution or transportation, will result in removal from the Federal service.

SECTION 2. *DISCIPLINARY PROCEDURES.*

Any disciplinary action under this Chapter will be taken in accordance with the requirements of the Civil Service Reform Act and other governing regulations which may apply.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SEATTLE REGIONAL OFFICE

GERALD BRUCE WATSON, JR.,	) Case No.
	) SE07528910074
Appellant,	)
	)
v.	)
	)
DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION	)
	)
Agency.	)

FIRST STIPULATION OF FACTS

COMES NOW the parties, through their undersigned attorneys and hereby stipulate to the following facts in the above matter:

GERALD B. WATSON, JR.

1. Mr. Watson was continuously employed by the Federal Aviation Administration from September 5, 1977, to December 4, 1988.

2. At the time of his removal, Mr. Watson was an electronics technician, assigned to the Airway Facilities Sector Field Office at Eugene, Oregon.

3. The Airway Facilities Division is responsible for the installation and maintenance of electronics systems used in air navigation and air traffic control; including communications, navigational aids, radar, and data processing systems.

4. The Airway Facilities Sector Field Office at Eugene, Oregon, is responsible for the installation and maintenance of electronic systems located within central Oregon.

5. As an electronics technician, Mr. Watson was trained and certified to maintain specific electronic equipment, including instrument landing systems (ILS), remote center air-ground communication facility (RCAG), radio controlled portion of both medium intensity approach light system (MALSR) and visual approach slope indicator system (VASI).

6. The instrument landing system (ILS) provides electronic guidance to aircraft making instrument approaches in bad weather.

7. The remote center air-ground communication facility (RCAG) provides radio link between the Seattle Air Route Traffic Control Center (ARTCC) and aircraft operating under instrument flight rules (IFR) over the western Oregon area. The Seattle ARTCC has responsibility for providing air traffic control services to aircraft operating over a large part of the northwestern United States, including central Oregon.

8. The medium intensity approach light system (MALSR) is a system of lights located at the approach end of instrument runways. It provides visual guidance to pilots landing at night or under instrument conditions. At certain airports, where there is no control tower or when the control tower is not in operation, pilots may operate the MALSR system by "keying" their aircraft radio on certain specified frequencies. By "keying" their radios, pilots can turn the system off and on and control its intensity.

9. The visual approach slope indicator (VASI) is a system of ground operated lights which provide glide slope information to pilots landing under all weather conditions and at night. At some airports, 2 without an operating control tower or with the control tower closed,

the VASI system may be turned off and on by pilots through "keying" their microphones on their airborne radios.

10. Most of Mr. Watson's duties were performed outside of the sector office. Such duties required him to drive a personal or Government vehicle to other airports or remote sites. Such duties had to be performed under all weather conditions. Additionally, on occasion, Mr. Watson's duties required him to operate a snow cat several miles over unimproved roads to a remote site.

PRIOR PERFORMANCE

11. On May 12, 1982, Appellent [sic] was suspended for three (3) days for the use of obscene language to his supervisor.

12. Each of Appellent's [sic] performance appraisals has been "fully successful" or its equivalent since 1977.

DELIVERY OF PROPOSED DEMOTION LETTER

13. The factual statements of Appellent [sic] (tab H) and Alfred Zwirner (tab I) accurately reflect the circumstances surrounding the delivery of the proposed demotion letter to Appellent [sic]. The letter was hand delivered to Appellent [sic] on August 31, 1988, by Mr. Vernon Harkins.

PROPOSED REMOVAL LETTER

14. The specifications set forth in the agency's letter dated August 31, 1988 (tab F), are hereby stipulated to. Additionally, it is further stipulated that on August 18, 1988, the following took place:

a. When Mr. Watson returned to his facility at about 12 noon, he requested that his supervisor grant him an annual leave for the rest of the day. His supervisor then advised him that he would be required to provide a urine sample.

b. During the 1 p.m. telephonic discussion involving Mr. Stead, Mr. Watson and Mr. McGrady, Mr. Stead said that Mr. Watson's selection to be tested was a random one and was not related to Mr. Watson's performance. Mr. Stead did not suspect that Mr. Watson was using or under the influence of drugs.

15. On September 1, 1987, Appellent [sic] was provided with a copy of the 30-day notice to employees subject to random drug testing (tab G).

DATED this 9th day of March, 1989.

/s/ Michael McGrady	/s/ John J. Callahan
Appellent's [sic] Representative	Agency Representative

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SEATTLE REGIONAL OFFICE

GERALD BRUCE WATSON, JR.,	)	DOCKET NUMBER
	)	SE07528910074
Appellant,	)	
	)	
v.	)	
	)	
DEPARTMENT OF TRANSPORTATION	)	
	)	
Agency.	)	
	)	

DECLARATION OF MELISSA J. ALLEN

I, MELISSA J. ALLEN, do declare under penalty of perjury that the following is true and correct to the best of my knowledge and belief:

1. I am the Deputy Assistant Secretary for Administration of the Department of Transportation (DOT), 400 Seventh Street, S.W., Washington, D.C. 20590. I have served in that capacity since January, 1986.

2. As Deputy Assistant Secretary for Administration, I am responsible for implementing the Drug Free Departmental Workplace Program pursuant to Executive Order 12564, "Drug-Free Federal Workplace." This program was approved by the Secretary of Transportation on June 29, 1987 and issued as DOT Order 3910.1. FAA Order 3910.6, dated September 23, 1987, implemented DOT Order 3910.1 within the Department's Federal Aviation Administration (FAA). Also, on June 29, 1987, the Department issued a notice to all agency employees, pursuant to section 4(a) of the Executive Order, announcing the program and indicating that drug testing would commence no sooner than sixty days from that date. A true and accurate copy of this notice is attached hereto as Exhibit 1. Finally, beginning in August 1987, the Department began issuing individual notices to each employee subject to random drug testing indicating that the employee could be subject to such testing no sooner than thirty days from receipt of the notice. A true and accurate copy of this notice is attached hereto as Exhibit 2.

II. DEPARTMENT OF TRANSPORTATION RANDOM DRUG TESTING PLAN

11. Under criteria specified in Executive Order 12564, the Department's program requires random drug testing of employees in critical safety and security

BEST AVAILA

positions (hereinafter defined as "sensitive positions") whose job functions have a direct impact on public health, safety, the protection of life and property, or national security. Examples of sensitive positions include air traffic control specialists, electronic technicians, criminal law enforcement investigators, aircraft mechanics, motor carrier safety specialists, and rail safety inspectors. The agency requires employees in any of these sensitive positions to submit to urinalysis in specified circumstances and on a random basis.

12. Applicants for sensitive positions are subject to preemployment testing. All DOT employees, whether in sensitive positions or not, are subject to reasonable suspicion testing, accident or unsafe practice testing, and voluntary testing. Further, those DOT employees in a drug rehabilitation and/or abatement program will be subject to follow-up tests administered by the agency on a random basis. Finally, all employees with a "Top Secret" security clearance have been placed in the sensitive position pool.

13. As of January 31, 1989, the total DOT civilian workforce is 64,046. The total number of civilian employees in sensitive positions for drug testing purposes as of February 19, 1989 is 31,731. Of the total sensitive position population, 30,156 (approximately 95 percent of the total) are under the FAA. The following chart represents (as of February 19, 1989) some of the key

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sensitive positions included in the Department's random drug testing program, the current number of employees in each position and the percentage of employees in each covered position compared to the total sensitive position population:

Occupation	Number of Employees in the Occupation	Percentage of Total Sensitive Position Population
Air Traffic Control Specialist	20,108	63.4
Electronic Technician	5,247	16.5
Air Traffic Assistant	1,390	4.4
Aviation Safety Inspector	1,035	3.3

Employees with "Top Secret" Security Clearance	687 [1]	2.2
Railroad Safety Inspector	311	1.0
Motor Carrier Specialist and Highway Safety Specialist	242	0.8
Civil Aviation Security Specialist	227	0.7
Aircraft Mechanic	201	0.6
Motor Vehicle Operator	71	0.2

[1]Since available data indicate that 276 employees with a "Top Secret" security clearance are also subject to random drug testing by virtue of their occupational grouping in a sensitive position, a total of 411 employees are subject to random drug testing solely by virtue of their having a "Top Secret" security clearance.

24. The Department also recognizes that the ultimate decision concerning the appropriate type of disciplinary action that may be imposed depends upon the circumstances of each individual case. In fact, I am aware that in the case of at least two DOT employees who refused to submit to a random drug test and received notices of proposed removals, the respective deciding officials ultimately determined that removal was unwarranted and lesser penalties were imposed. In these cases, the factual circumstances indicated that the employees' refusals to submit to drug testing was not based upon clear and conscious decisions to disobey wilfully the agency's order to comply with the drug testing procedures.

I declare under penalty of perjury that the aforegoing is true and correct to the best of my knowledge and belief.

/s/ Melissa J. Allen
MELISSA J. ALLEN

Executed this 6 of March, 1989.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SEATTLE REGIONAL OFFICE

GERALD B. WATSON,	) Case No.
	) SE07528910074
Appellant,	)
	)
v.	)
	)
DEPARTMENT OF TRANSPORTATION,	)
	)
	)
Agency.	)
	)

401 U.S. Courthouse
620 SW Main
Portland, Oregon
March 9, 1989

At the above time and place, the above entitled matter came on for hearing before:

JOHN W. TAPP, Administrative Judge

APPEARANCES:

GERALD B. WATSON, per
Michael McGrady
374 West 12th Avenue, Suite 2
Eugene, Oregon 97401

DEPARTMENT OF TRANSPORTATION, per
John J. Callahan, Deputy Chief Assistant Counsel
Northwest Mountain Region
Federal Aviation Administration C-68966
17900 Pacific Highway South
Seattle, Washington 98168, and

Paul S. Smith
Room 4102 (C-30)
400 Seventh Street Southwest
Washington, D.C. 20509

[TR 11>]

DONALD COONES,

Having been first duly sworn on oath, was called as a witness herein, was examined, and testified as follows:

*

DIRECT EXAMINATION

BY MR. CALLAHAN:

Q Will you state your name and address, please?
A My name is Donald Coones, and I live at West 8002 Mission, Spokane, Washington.
Q By whom are you employed Mr. Coones?
A The Federal Aviation Administration.
Q In what capacity are you currently employed?
A I am currently the Airway Facility Sector Manager at Portland, Oregon.
Q How long have you been employed in that capacity?
A In that specific job, one year.
Q Would you very briefly, for the Court, describe your duties and responsibilities as the Sector Manager?

A I am responsible for an organization that's rather large. It covers most of Oregon state and a little bit more; and the group of people that I manage maintain the electronic navigational systems, the communication systems, [TR 12>] the computer systems, in other words, they are total ground support for the Federal airway system.

Q Within your organization, that is, the Portland Airway Facility Sector, are there sub-organizations or smaller field offices, if you will?

A Yes, there are.

Q Approximately how many are there under your command?

A Well, there are approximately 14 sector field offices and three larger, what we call SF02 offices, which is an intermediate level of supervision.

[TR 15>]

Q Mr. Coones, I want to direct your attention back to August 18, 1988. There have already been some stipulations entered into by the parties regarding the facts that occurred on that date. Do you recall an incident involving Mr. Watson on that date?

A Yes, I do.

Q Could you briefly state when you first became aware of the situation, what your involvement was, and how you became aware of it?

A Okay. As I recall, I was called by the first level supervisor at Eugene, Dean Stead. He called to report to me that he had a problem with the drug testing program; that Bruce Watson had come in late, you know, later during the [TR 16>] day, approximately noon, as I recall, and had asked for annual leave. And he had advised Mr. Watson that he had to subject himself to a drug test, provide a urine sample, and that Mr. Watson had promised to be back, I believe it was by about 1:30. At such time, he would provide the sample, was the understanding that I have.

I understand that Mr. Watson did come back and said that he had been in contact with his attorney; and that he would like for Mr. Stead to talk to his attorney. Together, Mr. Watson and the attorney informed him, as I understand it, that he would not provide the urine sample.

[TR 18>]

Q Did you, at any time, take any official action with regard to Mr. Watson?

A Yes.

Q What was the first action you took, if you can recall?

A The first action that I recall taking was signing the letter of proposal to remove him for his refusal to submit to drug testing.

Q Why would you sign that letter? You had indicated you weren't Mr. Watson's first level supervisor.

A In our particular organization, it's a known factor that all major adverse actions are handled at my level.

Q Before Mr. Watson's removal was proposed, are you aware as to whether he was detailed to any position other than his existing position?

A I'm sorry. Would you restate that?

Q Yes. Before you proposed his removal, was anything done with regard to a detail for Mr. Watson?

A Yes, I don't remember the exact circumstances or the time frame, but I am aware that he was taken from his safety related duties of maintaining electronic facilities.

Q And what duties was he placed in, if you recall?

A I don't know exactly. They were basically administrative type work.

Q What were the circumstances leading up to your decision [TR 19>] to propose Mr. Watson's removal?

A There was the normal coordination with my personnel representative in Admin. 423, Vern Harkins. There was considerable discussion on a frequent basis of where we were, and where we were going. A part of his duties would normally be to prepare the letter of proposal to remove, and to coordinate that within the regional office. And that was the direction that he was headed.

Q Do you recall, at any time, whether or not Mr. Harkins directed you to propose Mr. Watson's removal?

A No, I don't. He did not.

Q Do you recall, at any time, Mr. Harkins indicating to you that someone above him had directed you to propose that removal?

A No I do not.

Q During this process, who was your supervisor, your immediate supervisor?

A My immediate supervisor -- well, it's a manager/assistant relationship, but Bob Waiblinger is the assistant division manager. He does my PER, and also with him is Melvin Yoshikami, the division manager. I consider I work for both of them almost equally.

JUDGE TAPP: The first name was what?

THE WITNESS: Robert Waiblinger, W-a-i-b-l-i-n-g-e-r.

[TR 20>]

JUDGE TAPP: And he is assistant?

THE WITNESS: Assistant division manager.

JUDGE TAPP: And then Mr. Melvin?

THE WITNESS: Yoshikami. Melvin Yoshikami.

JUDGE TAPP: Thank you.

BY MR. CALLAHAN:

Q Do you recall, at any time, discussing Mr. Watson's situation with either Mr. Waiblinger or Mr. Yoshikami?

A I certainly -- I'm sure that I had discussed it with them, but I don't remember any specific circumstance.

Q Do you recall whether at any time either one of those individuals directed you to propose Mr. Watson's removal?

A No they did not.

Q Did anyone, that you recall, direct you to do so?

A No.

Q This was your decision?

A Yes. I think it was a rather obvious one, but, yes. It was my decision.

Q Why did you make that decision to propose the removal?

A Well, because we have a drug testing process, and it requires that kind of activity in the event that someone refuses to provide a specimen.

Q Once you had proposed his removal, what, if any, further involvement did you have with the matter?

A Other than just passing discussions with the principles [sic] [TR 21>] involved in the case, I don't recall any specific involvement until his response came to the proposal to remove.

Q And that's the response that has been identified in the Agency's package; is that correct?

A Yes.

Q The letter written by Mr. McGrady?

A Yes.

Q Do you recall having any conversations, during this process, any conversations with Mr. Watson himself?

A Yes. I recall that we discussed it one time.

Q Essentially, what was the nature of that discussion?

A The general nature of that discussion, as I recall, was that he was challenging the system, based on his belief that it was unconstitutional, and that he understood that we were, more or less, unfortunate -- well, that it was just a process that we had to go through. And he felt like that it was really something that we had little control over.

Q During that discussion, did Mr. Watson indicate to you anything about an alternative testing that he had submitted to?

A Yes. I do remember him mentioning that he had presented a test to his supervisor, Dean Stead.

Q Do you remember any further discussion regarding that test as to what type of test it was, or when he had submitted to it, or any other details?

[TR 22>]

A Well, I recall that he said that it clearly provided that he was not a drug user at that time. And I was not aware of the results of this test at that time, or where it was, or what happened to it.

Q He indicated to you that it had showed a negative result; that is correct?

A That's correct.

Q During the time that you had talked to him or after that, did you have any reason not to believe him regarding that test?

A No I did not.

[TR 24>]

Q You have issued the notice of proposed removal letter in August of 1988. On October 5th, or sometime thereafter, you received a written response to that letter.

A All right.

Q And then, at some later time, you were told that, for whatever reason, the hold, placed by the district court, was lifted. What did you do then? What decisions did you make and how did you go about having those decisions carried out?

A I had already -- if I had his letter, as soon as I received his letter, I started studying it. I started looking for extenuating circumstances, or any reason not to proceed with the normally prescribed adverse action that was required.

And in that consideration, I was looking for something from him that would say that this was not just a direct case of refusal to submit his specimen; that there was, you know, some mitigating circumstance, and I could go [TR 25>] into various ones that may have been a big difference, but I didn't find any of that.

Q At the time you were considering his response, did you have an opinion as to whether you had to absolutely continue with the removal action, or did you have an opinion as to whether you had any discretion?

A I felt I had somewhat limited discretion, but I felt like -- I always feel like I have discretion to take an action that I have the authority to take.

Q What would be the process, had you proposed removal and then determined that something other than removal was the appropriate penalty? What would you have had to do?

A I would have gone to -- well, either Mr. Harkins or my boss. I would, obviously, have to talk to both of those people, both of those individuals, and explain my reasons, and ask that they effect the letter in that regard; and whatever the final penalty would be, well, we would assess that, or no penalty. But it would have to be written and approved within the regional office.

Q But you didn't do that, I take it?

A No. I did not.

Q You testified that you felt you had to go ahead with the removal action. What did you do then to have that decision implemented?

A I told Vern Harkins to proceed with the letter to [TR 26>] remove.

Q At any time, prior to your making that decision, were you directed by anyone to make the decision to remove Mr. Watson?

A No.

Q In making your decision, what, if any, consideration did you give to the situation itself; to what Mr. Watson had done? What was your opinion about that; that action on his part?

A Well, a major consideration was that this was a job performance related incident. There's a condition of employment within the FAA as an Airway Facilities Technician. He certifies facilities. He has to submit to a drug test. And he, according to all the information that I had, had not only willfully refused to submit, but he -- I'm sorry. I lost my train of thought.

Q What, if any, consideration did you give to the effect of his refusal on the organization itself; on how the organization --

A -- Considerable, really.

Q What conclusions or opinions did you draw from that consideration?

A Well, my consideration was, and still is, that if there is a lesser penalty for refusal, then you have an option for anyone who is subject to the drug testing program to decide [TR 27>] whether they're going to take their lumps, or they're going to get tested and go into the rehabilitation program. And I don't think that we can have an effective program if that option is available to them.

Q Why do we need an effective program, in your opinion? What's the value of such a program?

A Well, we need some kind of program to assure that we have a drug-free work force. It's very critical work that our technicians do. They don't talk to aircraft, but they do maintain -- they calibrate and adjust facilities, which, if properly done, could result on an airplane flying into the ground and killing some innocent people. I think it's very important that we have people with a clear mind, and we do our best to assure that we have that kind of work force.

Q What, if any, consideration did you give to doing something else to Mr. Watson; some other type of penalty, or some other arrangement other than removal?

A Very limited consideration. I was looking for an out from him which said, "I didn't understand what would happen to me if I refused", or "I am a user. I have a problem. Help me, or something to get me off the track of --" He had really decided that he did not want to submit to a drug test.

Q Were you aware that he had been provided prior notification of the test program?

[TR 28>]

A Yes. I made sure that that happened.

Q And how did you make sure of that?

A I checked to find out. There was a letter that was given to everyone. And people in his position, they were asked to sign this letter, and we kept a copy of it in the files.

Q And did that letter indicate, or give the employee an indication of what would happen with a refusal to submit to it?

A Yes. I think it was very clear.

Q It's been stipulated that Mr. Coones (sic) had, with the exception of one three day suspension action, that Mr. Watson's performance, while he's been an FAA employee, has been fully successful, or it's adjunctive equivalent in the earlier days. Were you aware of that?

A Yes.

Q What, if any, consideration did you give to that; that basically good work record; the acceptable work record?

A Yes. I really was looking for that.

Q Would that be reason to change your decision?

A I couldn't find any reason to change it based on satisfactory performance.

Q What if any, thought did you give as to the effect it would have putting Mr. Watson back to work within your sector or at his facility?

[TR 29>]

A I think the most negative factor, if Mr. Watson returned to work, would be a message to the work force that you don't have to take the drug test. There is an alternative. And if you've got a problem with drugs, and the random nature of the drug testing, it could be five years before you're faced with this decision again, conceivably.

[TR 32>]

CROSS EXAMINATION

BY MR. McGRADY:

Q Mr. Coones, are there circumstances under which if someone refused to take a random drug test that you could not propose removal?
A Yes.
Q Could you tell me what they are?
A I would probably go through the proposal process, if I may correct that. But if there are possible circumstances, then I would not follow through with it.
Q Could you tell me what those circumstances are?

A Without having the exact details, it's difficult. But I would think that if a person in that condition had stated that they were a drug user, they wanted to go into the rehabilitation program, and that they were going to subject themselves to the safeguards that are in that program, after we understand that someone's a user, then I probably would not go through the removal proceedings.

Q So, would there be any other circumstances you could think of?

A Yes. To me, it's very important that the due process -- that people are notified ahead of time; that this is a part of the program; that this is a condition of employment; and that they will be subject to drug testing as a condition of employment. If something in that process had not [TR 33>] occurred, then that would also, possibly, cause me to not go ahead and initiate a removal letter.

Q Would there be any other circumstances?

A Those are the two that come to my mind, obviously. I can't think of any others.

[TR 35>]

Q I believe you had just talked about having the call from a Mr. Stead, and you had said your initial discussion was with someone at the regional office, and you didn't recall exactly who it was. And then, I believe, Mr. Callahan asked you, "Did you make a decision on what would be done", and I thought you said, "No."

A No.

Q And right after, that you said you signed the proposed letter of removal.

A You're very correct. And what I intended to convey was that I did not make a decision specifically to remove him at that time. I knew that we were likely headed toward a major adverse action. But, at that time, I did not firmly make a decision he would have to be removed.

Q I also understood you to say that the drug testing process requires that kind of activity, when asked why you had decided to remove Mr. Watson. By that, do you mean that you felt constrained by the program's requirement for removal?

A To some point. I think, more specifically, I felt like [TR 36>] it was a very serious matter, and that at least a proposal to a removal process would have to be instituted.

[TR 36>]

Q I don't want to beat a dead horse here, but I just want to make sure. Can you think of any other circumstance you would have considered mitigating besides admission of drug [TR 37>] use, or a statement that the person didn't know removal was involved?

A Not off the top of my head, no. I can't come up with any other reasons.

Q Would it be fair to say that there probably isn't any other that you would consider?

A No. I don't think that is fair because I think I would consider anything that was given, extended as a reason.

Q Were you told, at any time, that Mr. Watson was concerned, because he's a black person, that melanin might give a false positive in his case?

A I heard that after the fact. I'm not sure about the timing of when I heard this. But I heard this at a conversation from someone else. I'm sure, before the removal, a paper was delivered, but I don't remember exactly when. I don't recall him ever stating that to me.

[TR 40>]

RECROSS EXAMINATION

BY MR. McGRADY:

[TR 41>]

Q Do I understand you correctly, however, that even if you had known that the testing that he'd done had been -- the chain of custody was careful; that the sampling was careful; and that the tests done were reliable and adequate testing, that wouldn't have changed your decision?

A Probably it would not have changed my decision.

Q Were you aware that the tests taken was taken within the two-hour time that the drug testing regulation provides for in the random test?

A No. I was not aware of the time sequence.

Q Would that have made a difference to you?

A I don't believe so.

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No. 92-1563

In the Supreme Court of the United States

OCTOBER TERM, 1992

GERALD B. WATSON, JR., PETITIONER

v.

DEPARTMENT OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
STUART E. SCHIFFER
Assistant Attorney General
DAVID M. COHEN
ROBERT V. ZENER
THOMAS W. PETERSON
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether petitioner was properly removed from federal service as a result of his refusal to participate in a required random drug test.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is unpublished, but the judgment is noted at 983 F.2d 1088 (Table). The opinion of the Merit Systems Protection Board (Pet. App. 22-42) is reported at 49 M.S.P.R. 509. The decision of the Administrative Law Judge (Pet. App. 43-71) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1992. A petition for rehearing was denied on December 29, 1992. Pet. App. 72-73. The petition for a writ of certiorari was filed on March 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 15, 1986, President Reagan issued Executive Order No. 12,564, entitled "Drug-Free Federal Workplace," which made it a condition of employment for all federal employees to refrain from using illegal drugs, both on and off duty. See 51 Fed. Reg. 32,889. The order also required each Executive agency to "develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public," and provided that each such plan was to include drug testing. *Id.* at 32,890. In response to that order, the Federal Aviation Administration (FAA) adopted a program that subjected incumbents of petitioner's position—which was "safety critical"—to random drug testing.[1] Pet. App. 2, 23-24, 26-27.

2. On August 18, 1988, petitioner was randomly selected for drug testing. Pet. App. 23. Acting upon the advice of an attorney, petitioner refused to take the drug test. *Id.* at 24. As a consequence, petitioner was immediately relieved of safety-related duties and given "administrative type" work. *Id.* at 94. Later that day, petitioner went to a private clinic and provided a urine sample, which was then sent to a commercial laboratory for testing. *Id.* at 24. The test results from that laboratory, subsequently submitted to the agency by petitioner, indicated that he was "negative." *Ibid.* The laboratory, however, had not been certified by the

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[1] Executive Order No. 12,564 provides that disciplinary actions "(including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act." 51 Fed. Reg. 32,891 (1986).

Department of Health and Human Services as meeting federally mandated standards. *Id.* at 27-28.[2]

On August 23, 1988, petitioner filed a civil action for declaratory and injunctive relief in the United States District Court for the District of Oregon. Pet. App. 48. The district court dismissed the action for lack of subject matter jurisdiction, holding that the Civil Service Reform Act provides the exclusive procedure for petitioner's challenge to the constitutionality of the random drug testing program. *Ibid.* On August 31, 1988, the FAA served notice that it proposed to remove petitioner from his position on the basis of his refusal to provide a urine specimen in accordance with the agency's random drug testing program. *Ibid.* Petitioner was removed on November 10, 1988. *Ibid.*

3. Petitioner appealed his removal to the Merit Systems Protection Board (MSPB). Pet. App. 44. Following a hearing, an administrative law judge (ALJ) concluded that the FAA's charge was supported by the evidence, and rejected all of petitioner's attempts to justify his refusal to submit to urinalysis. *Id.* at 49-54. However, the ALJ mitigated the penalty of removal to a 45-day suspension. *Id.* at 68. The ALJ found it "questionable" (*id.* at 60) whether the agency exercised discretion in selecting petitioner's penalty, citing a declaration submitted by Melissa J. Allen (the national coordinator for the agency's testing program) and the ALJ's own skepticism about the testimony of petitioner's supervisor. *Id.* at 55-60. Alternatively, the ALJ concluded that even if petitioner's supervisor or the agency "considered the relevant factors and exercised some

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[2] On April 11, 1988, the Department of Health and Human Services issued "Mandatory Guidelines for Federal Workplace Drug Testing Programs," which, *inter alia*, "establishe[d] standards for certification of laboratories engaged in urine drug testing for Federal agencies." 53 Fed. Reg. 11,970.

judgment, the penalty is still beyond the tolerable limits of reasonableness." *Id.* at 60.

The MSPB reversed the ALJ's mitigation of the penalty. Pet. App. 22-42. The MSPB noted that except in certain limited circumstances not applicable here, an employee in petitioner's position is required to "obey then grieve" (*id.* at 32-33, citing *Gragg* v. *United States Air Force*, 13 M.S.P.R. 296, 299 (1982), appeal dismissed, 717 F.2d 1343 (Fed. Cir. 1983)), and it found "no merit" in petitioner's "contention that the 'obey then grieve' rule should be suspended in this case." Pet. App. 32. The MSPB then concluded that "[t]he record [did] not support the [ALJ's] finding that the agency had predetermined the penalty." *Id.* at 35. The MSPB explained that the ALJ gave insufficient weight to Allen's declaration, and noted that the ALJ's disbelief of petitioner's supervisor was based on the legally erroneous premise that the supervisor was required "to provide a list of circumstances that might have caused him to adopt a lesser penalty." *Id.* at 35-37. Finally, the MSPB rejected the ALJ's conclusion that the penalty was unreasonable, observing that the ALJ had considered as "mitigating" certain legally irrelevant factors, and had concluded—contrary to petitioner's own testimony—that petitioner was willing to obey future drug testing directives without reservation. *Id.* at 37-40.

4. The court of appeals affirmed. Pet. App. 2-21. The court noted that under *Jackson* v. *Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985), the MSPB generally owes no deference to the ALJ's findings, but that the MSPB must articulate a "sound reason" when it rejects the ALJ's evaluation of testimonial evidence. Pet. App. 3-4. The court concluded that the MSPB articulated a "sound reason" in petitioner's case by relying on Allen's declaration and by explaining that the ALJ's credibility evaluation was

based on an erroneous legal premise—*i.e.*, that petitioner's supervisor was required to provide a more complete list of circumstances that might have caused him to seek a milder penalty. *Id.* at 3. The court then concluded that the MSPB's decision to remove petitioner—including the MSPB's conclusion "that the factors supporting mitigation were simply outweighed by those supporting removal"—was supported by substantial evidence. *Id.* at 4. Finally, the court approved the MSPB's application of the "obey then grieve" rule, noting that this Court applied a similar rule in *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). Pet. App. 6-7.

Judge Newman dissented. Pet. App. 8-16. She noted that suspicionless drug testing had been held unconstitutional by the Ninth Circuit (in a decision later reversed by this Court) at the time petitioner refused to participate (see *Railway Labor Executives' Ass'n* v. *Burnley*, 839 F.2d 575 (9th Cir. 1988), rev'd *sub nom. Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989)), and argued that equitable principles counseled against removal in view of petitioner's reliance on Ninth Circuit precedent. Pet. App. 15-16.[3]

ARGUMENT

The court of appeals correctly applied settled principles of administrative law in concluding that the MSPB's decision was supported by substantial evidence. Petitioner's fact-bound disagreement with the court of

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[3] Judge Michel filed a concurring opinion. Pet. App. 17-21. He pointed out that the argument advanced by Judge Newman in dissent had been waived by petitioner, and explained that in any event any error was harmless because Judge Newman failed to demonstrate that, even assuming that petitioner's reliance on Ninth Circuit law should be given mitigating weight, the MSPB abused its discretion by not reducing the penalty. *Ibid.*

appeals' application of those principles does not warrant review.

1. Petitioner first contends (Pet. 9-13) that the court of appeals erred in sustaining the MSPB's failure to defer to the ALJ's conclusions. Petitioner concedes (Pet. 11) that *Jackson* v. *Veterans Administration*, 768 F.2d 1325 (Fed. Cir. 1985), on which the court of appeals relied, correctly sets forth the circumstances under which the MSPB may depart from an ALJ's credibility determinations. Applying that test, the court reasonably concluded that the MSPB gave adequate reasons for declining to defer to the ALJ in this case. See Pet. App. 2-4. Because petitioner raises no important or unsettled issue of law, but merely invites the Court to review the record to determine whether the court of appeals correctly applied the *Jackson* test in the circumstances of this case, further review is not warranted.

2. Petitioner next contends (Pet. 13-19) that the court of appeals allowed the MSPB to cure the agency's failure to exercise discretion in selecting a penalty. That contention ignores the record. First, the MSPB specifically found that the FAA itself had exercised the required discretion (see Pet. App. 37-38), so there was no void for the MSPB to fill. Second, the court of appeals affirmed the MSPB's finding that the deciding FAA official exercised discretion in selecting the penalty. *Id.* at 3-4. Because the court of appeals did not hold, as petitioner suggests, that the MSPB may rationalize the agency's failure to exercise discretion, the decision below is fully consistent with *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), and with the statutory provisions for MSPB and judicial review of agency decisions, 5 U.S.C. 7513(d) and 7701(c)(1).

3. Finally, petitioner contends (Pet. 19-27) that the FAA was required to follow the Ninth Circuit's decision striking down suspicionless drug testing until that

decision was reversed by this Court, and that the agency's failure to obey settled law and petitioner's reliance on the Ninth Circuit's decision are circumstances that should be considered in mitigation as a matter of law. As the court of appeals noted, however, petitioner failed to make those arguments below, and he accordingly waived them. Pet. App. 5; *id.* at 19 (Michel, J., concurring). In any event, as the court below also noted, the state of the law when petitioner refused to take the drug test was "plainly unsettled, even in the Ninth Circuit," because this Court had already granted certiorari to review the Ninth Circuit's conclusion. *Id.* at 5-6 (citing *Burnley* v. *Railway Labor Executives' Ass'n*, 486 U.S. 1042 (1988)). Finally, petitioner's argument concerning the weight to be given an employee's understanding of the controlling law in determining an appropriate penalty runs afoul of the "obey then grieve" rule sanctioned by this Court in *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). Pet. App. 6-7, 17-19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
STUART E. SCHIFFER
Assistant Attorney General
DAVID M. COHEN
ROBERT V. ZENER
THOMAS W. PETERSON
Attorneys

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